United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant **and** **U.S. POSTAL SERVICE, PALATINE PROCESSING & DISTRIBUTION CENTER, Palatine, IL, Employer**	)	**Docket No. 15-1500** **Issued: November 3, 2015**

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 H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 6, 2015 appellant filed a timely appeal from an April 22, 2015 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 met her burden of proof to establish more than five percent permanent impairment of each upper extremity for which she received schedule awards.

On appeal appellant asserts that she was never compensated for the five percent impairments.

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[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] In an October 21, 2010 decision, the Board found the case not in posture for decision regarding appellant's upper extremity impairments. The Board found that Dr. Walter L. Saltzman, a Board-certified orthopedic surgeon and impartial specialist, did not adequately explain how his impairment rating conformed to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[3] Since Dr. Saltzman's opinion was not sufficiently rationalized and did not resolve the conflict in medical opinion, it was not entitled to the special weight accorded a referee opinion. The Board set aside the December 9, 2009 OWCP decision and remanded the case to OWCP. On remand OWCP was directed to forward the record, including an updated statement of accepted facts listing all accepted conditions, to Dr. Saltzman for clarification regarding appellant's bilateral upper extremity impairments. If he was unable to clarify his opinion, OWCP was to refer appellant to another impartial medical specialist to resolve the issue of the extent of permanent upper extremity impairment.[4] The facts of the previous Board decision are incorporated herein by reference.

Following remand, OWCP determined that a second opinion evaluation was needed and referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon. In a February 9, 2011 report, Dr. Brecher noted his review of the medical record and appellant's complaint that

[2] On October 1, 1986 appellant, a distribution clerk, filed an occupational disease claim accepted for bilateral/ lateral epicondylitis. The claim was adjudicated by OWCP under file number xxxxxx801. Under this claim, on April 26, 2004 appellant was granted a schedule award for one percent permanent impairment of the right arm and one percent impairment on the left. This claim was later expanded to include myofascial pain syndrome of both arms. On January 31, 2006 appellant filed an occupational disease claim, alleging that she had bilateral carpal tunnel syndrome. The claim was adjudicated by OWCP under file number xxxxxx914. Appellant retired effective February 6, 2006. By decision dated January 25, 2007, an OWCP hearing representative reversed a June 15, 2006 decision and accepted bilateral carpal tunnel syndrome. On March 2, 2007 appellant filed a schedule award claim for permanent impairment due to her carpal tunnel syndrome. OWCP determined that a conflict in medical evidence had been created between the opinion of Dr. Kevin Walsh, a Board-certified orthopedic surgeon and OWCP referral physician, and Dr. Mitchell Goldflies, an attending Board-certified orthopedic surgeon. In August 2007 it referred appellant to Dr. Martin L. Saltzman, a Board-certified orthopedic surgeon, for an impartial evaluation regarding the degree of upper extremity impairment. In a September 5, 2007 report, Dr. Saltzman concluded that in the absence of objective findings relating to carpal tunnel syndrome, appellant had no permanent impairment. On December 26, 2007 Dr. Robert W. Wysocki, a Board-certified orthopedic surgeon and OWCP medical adviser, advised that appellant had five percent permanent impairment for each arm. On March 6, 2008 the claims were administratively combined. By decision dated October 6, 2008, appellant was granted a schedule award for an additional four percent impairment of each arm. On December 18, 2008 an OWCP hearing representative set aside the October 6, 2008 schedule award decision because OWCP relied on the opinion of its medical adviser rather than Dr. Saltzman, the impartial examiner. Following remand, OWCP referred the record to Dr. Amon T. Ferry, also Board-certified in orthopedic surgery and an OWCP medical adviser. On March 31, 2009 he reviewed the medical record, including Dr. Saltzman's report, and concluded that appellant was not entitled to a schedule award greater than one percent for each arm because Dr. Saltzman found no objective findings to suggest carpal tunnel syndrome. By decision dated May 27, 2009, OWCP found that appellant was not entitled to a schedule award greater than one percent permanent impairment for each arm. By decision dated December 9, 2009, an OWCP hearing representative affirmed the May 27, 2009 decision.

[3] A.M.A., *Guides* (6th ed. 2nd 2009).

[4] Docket No. 10-705 (issued October 21, 2010).

she felt that her shoulder could pop out of joint and that her right thumb could catch. He advised that her physical examination was normal, and that there was no electrodiagnostic study in the record to confirm carpal tunnel syndrome. Dr. Brecher concluded that appellant had no impairment based on the sixth edition of the A.M.A., *Guides*.

By decision dated April 11, 2011, OWCP found that appellant was not entitled to an additional schedule award. She timely requested a review of the written record by an OWCP hearing representative, and maintained that the award for five percent permanent impairment should be honored.

In a July 22, 2011 decision, an OWCP hearing representative found that a conflict in medical opinion remained because OWCP had not followed the Board's remand order. Instead of attempting to obtain a supplemental opinion from Dr. Saltzman or, if he was not available, to refer appellant for a new impartial evaluation, OWCP referred appellant back to Dr. Brecher for a second opinion evaluation. The hearing representative also found that the statement of accepted facts provided Dr. Brecher was incomplete, and that OWCP should note that it had accepted that appellant "sustained a total of six [*sic*] percent permanent partial impairment" of each upper extremity due to her work injuries. OWCP should then attempt to obtain a rationalized opinion from Dr. Saltzman, or if he was not available, refer appellant for a new impartial evaluation.[5]

On August 22, 2012 OWCP referred appellant to Dr. Hythem P. Shadid, a Board-certified orthopedic surgeon, for an impartial evaluation.[6] In an October 15, 2012 report, Dr. Shadid noted that he evaluated appellant on September 12, 2012. He reviewed the medical record, including a statement of accepted facts, and described her complaint of intermittent bilateral forearm pain and a finger-catching sensation. Dr. Shadid advised that appellant had no difficulty with activities of daily living. He reported that his findings on examination were normal and that maximum medical improvement was reached on January 31, 2006, when she had no objective signs or symptoms of carpal tunnel syndrome. Dr. Shadid advised that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant would be rated based on peripheral nerve impairment methodology. He found a class 0 impairment because she had no objective physical findings. Dr. Shadid then addressed findings under Table 15-23, Entrapment/Compression Neuropathy Impairment. He advised that appellant had no impairment for test findings because an October 15, 2005 electrodiagnostic study failed to meet the criteria found in Appendix 15-B of the A.M.A., *Guides*, and was thus considered a normal study. Dr. Shadid also found zero modifiers for functional history and physical findings because appellant had no symptoms consistent with carpal tunnel syndrome and because her physical examination was normal. He concluded that appellant had no impairment.

By decision dated March 21, 2013, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Shadid and concluded that appellant was not entitled to a schedule award greater than that which was previously awarded for each upper extremity.

[5] Appellant filed another schedule award claim on June 3, 2012.

[6] There is no indication in either case record that OWCP attempted to obtain a supplemental report from Dr. Saltzman.

On April 22, 2013 appellant, through counsel, requested a hearing before an OWCP hearing representative. In an October 8, 2013 report, Dr. Mitchell L. Goldflies, an attending Board-certified orthopedic surgeon, advised that appellant had continued symptoms in both upper extremities. He advised that physical examination demonstrated swelling of both hands, worse on the right, and tenderness of both elbows at the lateral epicondyle, with decreased wrist and elbow range of motion. Phalen's test and Tinel's sign were positive, and Spurling's test negative. Dr. Goldflies diagnosed lateral epicondylitis of the humerus, myofascial pain, and evidence of bilateral carpal tunnel syndrome. He advised that appellant had very limited use of the upper extremities, provided physical restrictions, and recommended bilateral carpal tunnel release surgery.

Appellant did not appear at the May 9, 2014 hearing. The hearing representative and counsel discussed whether appellant had been awarded for five or six percent permanent bilateral arm impairment. Counsel argued that the case contained procedural flaws in that the statement of accepted facts provided Dr. Shadid was incorrect, that he did not fully explain his impairment method of choice, and the file was not forwarded to an OWCP medical adviser for review after Dr. Shadid's evaluation. He asserted that the reports of Dr. Brecher and Dr. Shadid should be stricken from the record and that additional conditions should be accepted.

In a June 27, 2014 decision, the hearing representative remanded the case to OWCP. He found that appellant had received schedule awards for a total five percent permanent impairment of each upper extremity, and noted procedural errors including that the statement of accepted facts contained factual and procedural errors. The hearing representative determined that the reports of Dr. Brecher and Dr. Shadid need not be excluded but advised OWCP to prepare a new statement of accepted facts, and forward the case to Dr. Shadid. OWCP was to inform Dr. Shadid of the corrections in the statement of accepted facts and request that he provide a reasoned opinion with regard to the method used in his assessment of appellant's upper extremity impairment, including a reasoned explanation of the method chosen. Following receipt of Dr. Shadid's report, it was to forward the record to an OWCP medical adviser for review. The hearing representative instructed counsel that if he wished the accepted conditions be expanded, he should ask OWCP, in writing, for a formal decision.

On remand OWCP prepared a statement of accepted facts regarding both claim files. It described appellant's job duties, listed medical evaluations, and described the schedule awards received. In October 2014 OWCP again referred her to Dr. Shadid for an impartial evaluation. Dr. Shadid was informed that the statement of accepted facts had been changed and was asked to provide a new impairment rating and date of maximum medical improvement in which he explained why he did not use the diagnosis-based impairment (DBI) method of rating appellant's impairment under the sixth edition, as this was the primary method of evaluating an upper limb.

In a report dated November 19, 2014, Dr. Shadid indicated that he examined appellant on October 15, 2012. He again reviewed the medical record, commenting that it included a revised statement of accepted facts. Dr. Shadid reported that appellant had an intermittent finger-catching sensation, but no symptoms at the time of his examination. He described complete findings on examination of bilateral hands, wrists, and elbows, and reported that appellant had no objective abnormal physical findings on examination. Dr. Shadid noted that the corrected statement of accepted facts did not change his opinion. He noted the accepted

conditions of bilateral/lateral epicondylitis, myofascial pain syndrome, and carpal tunnel syndrome. Dr. Shadid advised that these conditions were not associated with any disability or permanent impairment under the A.M.A., *Guides* for two reasons -- that the intermittent finger-locking was not associated with any of the accepted conditions and, more importantly, appellant had no objective findings that were manifestations of the accepted conditions. He advised that, while most diagnoses could reliably be evaluated under the DBI method, carpal tunnel syndrome was not one of them, and it should be evaluated under peripheral nerve entrapment methodology, which he used to evaluate appellant's bilateral carpal tunnel syndrome impairment. Dr. Shadid continued that, because appellant had no abnormal findings, the DBI method assigned her class 0 under all diagnoses, and this resulted in zero percent impairment regardless of grade modifier adjustments. He also indicated that the impairment rating for carpal tunnel syndrome was 0 regardless of the method used. Dr. Shadid concluded that appellant's impairment rating was zero percent because she had no significant symptoms or signs to establish impairment. He attached charts showing his impairment calculations, and noted that maximum medical improvement was reached on January 25, 2006.

On March 23, 2015 Dr. David H. Garelick, an OWCP medical adviser who is a Board-certified orthopedic surgeon, noted the past impairment ratings in 2005 and 2009, noting that the reports thoroughly described the rationale for the rating awarded as well as a history of appellant's condition at that time. He also reviewed the record including Dr. Brecher's 2011 report and those of Dr. Shadid in 2012 and 2014. Dr. Garelick noted that Dr. Shadid had "articulated a well thought out argument recommending zero percent impairment of each upper extremity," based on the lack of objective findings noted on physical examination. He advised that he agreed with Dr. Shadid that there was insufficient objective evidence to support any upper extremity impairment at that time and thus no objective basis for an additional upper extremity award.

In a merit decision dated April 22, 2015, OWCP found that appellant did not establish an upper extremity impairment greater than the bilateral five percent previously awarded.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing federal regulations[8] 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 second printing of the sixth edition of the A.M.A., *Guides* as the uniform standard applicable

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

to all claimants.[9] For decisions after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[10]

The sixth edition of 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).[11] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[12] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[14]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text in section 15.4f of the A.M.A., *Guides*.[15] In Table 15-23, grade modifiers levels (ranging from 0 to 4) 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.[16]

Section 8123(a) of FECA 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.[17] The implementing regulations state 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.[18] When there exists opposing medical reports of virtually equal weight

[9] *Id*. at § 10.404(a).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.8085a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[11] A.M.A., *Guides, supra* note 3 at 3, section 1.3, "The ICF: A Contemporary Model of Disablement."

[12] *Id*. at 385-419.

[13] *Id*. at 411.

[14] *Id*. at 23-28.

[15] *Id*. at 433-50.

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

[17] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[18] 20 C.F.R. § 10.321.

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.[19]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[20] While the medical adviser may review the opinion of a referee specialist in a schedule award case, the resolution of the conflict is the specialist's responsibility. The medical adviser cannot resolve a conflict in medical opinion. If necessary, clarification to the referee examiner may be needed.[21]

ANALYSIS

OWCP accepted bilateral/lateral epicondylitis, bilateral upper extremity myofascial pain syndrome, and bilateral carpal tunnel syndrome under claim file numbers xxxxxx801 and xxxxxx904. On April 26, 2004 appellant was granted a schedule award for one percent permanent impairment of each upper extremity for the bilateral/lateral epicondylitis. On June 6, 2008 she was granted schedule awards for an additional four percent permanent impairment of each upper extremity.[22]

As described above, procedural difficulties followed the 2008 schedule award. Most recently, in October 2014 OWCP referred appellant to Dr. Shadid for the second time, to perform an impartial evaluation regarding appellant's upper extremity impairment.[23]

The Board finds that Dr. Shadid's opinion is thorough and well rationalized and represents the special weight of the medical evidence.[24] In reports dated October 15, 2012 and November 19, 2014, Dr. Shadid described complete findings on examination of bilateral hands, wrists, and elbows and reported that appellant had no objective abnormal physical examination findings in both 2012 and 2014. In the November 19, 2014 report, he advised that a corrected statement of accepted facts did not change his opinion. Dr. Shadid opined that the accepted conditions of bilateral/lateral epicondylitis, myofascial pain syndrome, and carpal tunnel syndrome were not associated with any disability or permanent impairment under the A.M.A., *Guides* for two reasons -- that the intermittent finger-locking was not associated with any of the

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[19] *V.G.*, 59 ECAB 635 (2008).

[20] *See supra* note 2 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f (February 2013).

[21] *Richard R. Lemay*, 56 ECAB 341 (2005); *see id*. at Chapter 2.808.6.g(1) (February 2013).

[22] *Supra* note 2.

[23] In 2007 OWCP had determined that a conflict in medical evidence had been created between the opinions of Dr. Goldflies, an attending physician, and Dr. Walsh an OWCP referral physician, regarding the degree of appellant's upper extremity impairment. The conflict remained in 2014.

[24] *Barry Neutuch*, 54 ECAB 313 (2003).

accepted conditions and, more importantly, appellant had no objective findings that were manifestations of the accepted conditions. He advised that, while most diagnoses could reliably be evaluated under the DBI method, carpal tunnel syndrome was not one of them and should be evaluated under peripheral nerve entrapment methodology, which he used this method to evaluate appellant's bilateral carpal tunnel syndrome impairment. Dr. Shadid's continued that because appellant had no abnormal findings, the DBI method assigned her class 0 under all diagnoses, and this resulted in no impairment regardless of grade modifier adjustments. He also indicated that the impairment rating for carpal tunnel syndrome was zero regardless of the method used. Dr. Shadid concluded that appellant's impairment rating was zero because she had no significant symptoms or signs to establish impairment.

The Board has carefully reviewed the opinion of Dr. Shadid and finds that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue in the present case. Dr. Shadid's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history and accurately summarized the relevant medical evidence.[25] He provided medical rationale for his opinion by explaining that he found minimal findings on his physical examination of appellant. Dr. Shadid's opinion is entitled to special weight as the impartial medical examiner and establishes that appellant has not established an upper extremity impairment greater than that previously awarded.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.[26]

CONCLUSION

The Board finds that appellant failed to establish more than five percent permanent impairment of each upper extremity.

[25] *See Melvina Jackson*, 38 ECAB 443 (1987).

[26] As to appellant's assertion on appeal, the record is unclear as to whether she was compensated for the entire five percent permanent impairment previously awarded.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board