

**United States Department of Labor
Employees' Compensation Appeals Board**

J.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 15-1847
Issued: March 4, 2016**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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 September 9, 2015 appellant, through counsel, filed a timely appeal from a July 22, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 proven permanent impairment of his right upper extremity warranting a schedule award.

FACTUAL HISTORY

On April 29, 2007 appellant, then a 40-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on that same date he sustained a contusion of the right hand when he smashed his hand between a steel column and mail wagon rack. He did not stop work.

¹ 5 U.S.C. § 8101 *et seq.*

OWCP accepted the claim for right hand contusion, right wrist traumatic median neuropathy, and right wrist traumatic radial neuropathy.

In a February 18, 2008 electromyography (EMG) report, Dr. Robert F. Richardson, a Board-certified neurologist, reported that the right upper extremity EMG revealed evidence of a mild median mononeuropathy at the right wrist (carpal tunnel syndrome), without active denervation of thenar muscle. The testing also provided electrophysiological evidence of a distal sensory radial neuropathy.

On October 16, 2009 appellant underwent right carpal tunnel release and decompression of the right ulnar nerve at the elbow and wrist. He returned to work on October 29, 2009 with restrictions of no repetitive use of his right hand or elbow. Appellant continued to work modified light duty. He received intermittent short-term rolls wage-loss benefits as of August 26, 2010.

OWCP referred appellant, a statement of accepted facts (SOAF), a series of questions, and the case file to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, on January 19, 2012 for an examination and opinion regarding the nature and extent of disability.²

In a February 7, 2012 report, Dr. Kaffen provided a review of past medical records and findings on physical examination. He opined that appellant's accepted injuries of contusion of right wrist and hand, right wrist median neuropathy, and right wrist radial neuropathy had resolved and that his current medical condition of ulnar neuropathy of the right upper extremity at the elbow was nonwork related. Dr. Kaffen concluded that appellant was capable of performing his work duties as a mail processor without restrictions on a full-time basis based on the accepted conditions in this claim.

On February 18, 2014 appellant filed a claim for a schedule award (Form CA-7).

By letter dated February 24, 2014, OWCP requested that appellant submit an impairment evaluation from his attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). It afforded him 30 days to submit the requested impairment evaluation.

By letter dated April 9, 2014, counsel argued that appellant sustained permanent impairment due to his work-related injuries and submitted a March 27, 2014 report from Dr. Catherine Watkins Campbell, Board-certified in family medicine, in support of his schedule award claim.

In the March 27, 2014 report, Dr. Campbell related that she evaluated appellant on March 6, 2014 for the accepted conditions of contusion of right wrist and hand, right median nerve lesion, and lesion of right radial nerve. She summarized past medical records, reviewed

² While OWCP referred to Dr. Kaffen as a referee physician, absent a conflict in medical opinion regarding the degree of permanent impairment. Dr. Kaffen's designation as an impartial medical examiner was inappropriate regarding the schedule award issue. His finding therefore, may not be afforded the special weight of an impartial medical specialist and he should be considered as a second opinion physician. See *M.R.*, Docket No. 11-1419 (issued May 12, 2012).

diagnostic testing, and provided findings on physical examination. Dr. Campbell opined that appellant reached maximum medical improvement (MMI) during the summer of 2013.

Using the sixth edition of the A.M.A., *Guides*,³ Dr. Campbell opined that appellant had five percent permanent impairment of the right upper extremity. According to Table 15-23 (Entrapment/Compression Neuropathy Impairment), she calculated three percent upper extremity impairment for the diagnosis right median nerve lesion.⁴ For the diagnosis of right radial nerve lesion, in accordance with Table 15-18 (Impairment of Sensory Only Peripheral Nerve), Dr. Campbell calculated one percent impairment of the right upper extremity.⁵ Based on Table 15-3 (Wrist Regional Grid), she calculated one percent impairment of the right upper extremity for the diagnosis of right wrist and hand contusion.⁶ Thus, Dr. Campbell determined that appellant had five percent permanent impairment of the right upper extremity.

OWCP routed Dr. Campbell's report, the SOAF, and the case file to Dr. Morley Slutsky, an OWCP district medical adviser (DMA) Board-certified in occupational medicine, for review and a determination on whether appellant sustained a permanent partial impairment of the right upper extremity and the appropriate date of MMI.

In a July 30, 2014 report, Dr. Slutsky disagreed with Dr. Campbell's assessment and opined that appellant had no ratable right upper extremity impairment as a result of his work-related injuries. He explained that the date of MMI was February 7, 2012, the date of Dr. Kaffen's examination. Dr. Slutsky further noted that he utilized Dr. Kaffen's findings for final rating purposes as he found no objective evidence of right wrist contusion and radial nerve involvement. He reported that there was dysesthesia in the right medial nerve distribution but appellant's pre and postoperative EMG testing did not meet the A.M.A., *Guides* criteria to use Table 15-23 (Entrapment/Compression Neuropathy Impairment).⁷ Dr. Slutsky noted that because appellant's symptoms related to carpal tunnel syndrome, the A.M.A., *Guides* required the right wrist to be rated as nonspecific wrist pain.⁸ He noted that Dr. Campbell documented sensory changes in the right radial nerve distribution which were not found by other providers in recent records and rated appellant's wrist contusion when this condition had resolved. Dr. Slutsky further noted that Dr. Campbell used the compression neuropathy table despite pre and postoperative EMG/nerve conduction velocity (NCV) tests which revealed normal findings.

Utilizing Table 15-3 for the diagnosis of right wrist nonspecific pain, Dr. Slutsky subtracted 1, the numerical value of the class, from the numerical value of the grade modifier for each applicable component he assigned (physical examination, functional history, and clinical

³ A.M.A., *Guides* (2009).

⁴ *Id.* at 449.

⁵ *Id.* at 429.

⁶ *Id.* at 395.

⁷ *Supra* note 3.

⁸ *Id.* at 445-46.

studies) and then added those values, resulting in a net adjustment of -2 ((0-1) + (1-1) + (0-1)).⁹ Application of the net adjustment formula meant that movement was warranted two places to the left of class 1 default value grade C to grade A for zero percent right upper extremity impairment.¹⁰

By decision dated December 3, 2014, OWCP denied appellant's claim for a schedule award as the evidence was insufficient to establish a permanent impairment to a member or function of the body.

On December 9, 2014 appellant, through counsel, requested a telephone hearing before a hearing representative in OWCP's Branch of Hearings and Review.

At the June 9, 2015 hearing, counsel for appellant argued that Dr. Campbell's report was sufficient to establish permanent impairment to the right upper extremity. He further asserted that there was a conflict between Dr. Slutsky and Dr. Campbell and the case should be sent for an impartial examination to resolve the conflict in medical opinion.

By decision dated July 22, 2015, a hearing representative affirmed the December 3, 2014 schedule award decision. She noted that Dr. Slutsky properly utilized the A.M.A., *Guides* to determine that appellant did not sustain any permanent impairment to a member or function of the body.

LEGAL PRECEDENT

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 or loss of use of scheduled members or functions of the body.¹¹ 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.¹²

The A.M.A., *Guides* provide a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹³ In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity

⁹ *Supra* note 5.

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

¹² *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).

¹³ A.M.A., *Guides*, *supra* note 2 at 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

to be rated. After the Class of Diagnosis (CDX) is determined for the diagnosed condition (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS).¹⁴ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁵ 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.¹⁶

In the sixth edition, a grid listing relevant diagnoses is provided for each region of the upper extremity: the digit region, the wrist region, the elbow region, and the shoulder region. A regional impairment will be defined by class and grade. The class is determined first by using the corresponding regional grid. The grade is initially assigned the default value for that class. This value may be adjusted slightly using nonkey grade modifiers such as functional history, physical examination, and clinical studies.¹⁷

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP 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.¹⁸

ANALYSIS

OWCP accepted appellant's claim for right hand contusion, right wrist traumatic median neuropathy, and right wrist traumatic radial neuropathy. It approved surgery for decompression of the right ulnar nerve at elbow and wrist and a right carpal tunnel release of October 16, 2009. The issue is whether appellant established permanent impairment due to his work-related injuries. The Board finds this case is not in posture for decision.

OWCP based its denial of appellant's schedule award claim on the July 30, 2014 medical report of Dr. Slutsky, serving as the OWCP DMA. The Board notes that Dr. Slutsky based his impairment rating on the findings made by Dr. Kaffen in his February 7, 2012 second opinion medical examination. Dr. Campbell's impairment rating was based on her March 6, 2014 evaluation documenting more current findings pertaining to appellant's condition. The Board finds that Dr. Slutsky's impairment rating was based on stale medical evidence and is insufficient to form the basis for appellant's schedule award claim.¹⁹

¹⁴ *Id.* at 385-419.

¹⁵ *Id.* at 411.

¹⁶ *Id.* at 23-28.

¹⁷ *Id.* at 387.

¹⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (February 2013).

¹⁹ *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

Dr. Slutsky references the results of pre and postoperative EMG testing as a basis to utilize the diagnosis of right wrist nonspecific pain. However, the only EMG study specifically addressed was the February 18, 2008 preoperative test in support of his assessment. It is unclear what postoperative report Dr. Slutsky is referring to as the record is devoid of an EMG study following appellant's April 29, 2007 injury. Moreover, while Dr. Slutsky noted that Dr. Campbell documented sensory changes in the right radial nerve distribution which were not found by other providers in recent records, he failed to specifically address what current records he was referring to and the differences in these evaluation findings. It is unclear why Dr. Slutsky would utilize a February 18, 2008 report if there were more current medical examination findings of record. Thus, the older medical reports referenced by Dr. Slutsky are insufficient to establish appellant's claim for a schedule award.²⁰

The Board has held that stale medical evidence cannot form the basis for current evaluation of residual symptomology or disability determination.²¹ Therefore, the Board finds that Dr. Slutsky's report is of reduced probative value as he is relying on stale examination findings to calculate his impairment rating.²² Given that Dr. Slutsky did not base his rating on current examination findings, his opinion on permanent impairment is deficient and insufficient to form the basis of appellant's schedule award claim.²³

On remand, OWCP should refer appellant to have EMG and NCV testing performed on the upper right extremities. It should then refer the results of the EMG/NCV studies, a SOAF, the case record, and appellant for a second opinion examination and opinion regarding whether he sustained any permanent partial impairment as a result of his employment-related injuries and date of MMI.²⁴ Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

CONCLUSION

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

²⁰ See *H.C.*, Docket No. 11-1407 (issued May 11, 2012) (finding that Dr. Weiss did not reexamine appellant and relied on a 2004 examination such that his report constituted stale medical evidence and did not create a conflict of medical opinion evidence).

²¹ See *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity determination).

²² *L.T.*, Docket No.13-997 (issued June 10, 2014).

²³ See *W.M.*, Docket No. 12-773 (issued March 29, 2013) (where the Board found that a physician's 2010 impairment opinion, seeking to update a prior report based on 2004 findings, constituted stale medical evidence); *P.S.*, Docket No. 12-649 (issued February 14, 2013) (the Board found a physician's impairment opinion of reduced probative value where the physician relied on three-year old findings to update his impairment rating).

²⁴ *J.S.*, Docket No. 13-2132 (issued July 23, 2014).

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: March 4, 2016
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