United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 17-1603**
	)	**Issued: April 10, 2018**
DEPARTMENT OF THE NAVY, NAVAL SUPPLY SYSTEMS COMMAND, Gulfport, MS, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 18, 2017 appellant filed a timely appeal from March 13 and 22, and May 12, 2017 merit decisions and May 5 and June 22, 2017 nonmerit decisions 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 the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish employment-related carpal tunnel syndrome and whether OWCP properly denied the request for decompression surgery for this condition; (2) whether appellant established more than seven percent permanent impairment of the right arm for which he received a schedule award; (3) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) regarding denial of the expansion of his claim and authorization for surgery; and,

[1] 5 U.S.C. § 8101 *et seq.*

(4) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) regarding the schedule award issue.

On appeal appellant asserts that the medical evidence establishes that carpal tunnel syndrome is causally related to the July 8, 2008 employment injury and that he is entitled to an increased schedule award.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated November 15, 2010, the Board affirmed September 29, 2009 and January 4, 2010 OWCP merit decisions that denied appellant's claim for a schedule award.[2] In a February 14, 2013 decision, the Board found that, by a July 26, 2012 decision, OWCP properly denied appellant's request for a hearing.[3] In a second February 14, 2013 decision, the Board affirmed an August 17, 2012 OWCP decision on the issue of whether appellant established clear evidence of error regarding the denial of his claim for disability compensation. The Board, however, found that OWCP erroneously denied appellant's request for reconsideration regarding his entitlement to a schedule award under the clear evidence of error standard because the record contained a September 15, 2010 impairment analysis from an attending Board-certified orthopedic surgeon, Dr. Henry Leis, who concluded that, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] appellant had four percent permanent right arm impairment. The Board remanded the case to OWCP to issue a merit decision regarding appellant's schedule award request.[5] By decision dated October 24, 2016, the Board found that appellant did not establish more than seven percent impairment of the right arm, for which he previously received a schedule award. The Board further found that OWCP properly refused to reopen appellant's claim for further review of the merits of the schedule award pursuant to 5 U.S.C. § 8128(a), and that OWCP properly denied appellant's request for a hearing.[6] The facts of the case as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

The accepted conditions in this case are sprain of the right elbow and forearm, lateral epicondylitis and entrapment lesion of the ulnar nerve at the right elbow, and articular cartilage disorder of the right elbow, caused by a July 8, 2008 employment injury when appellant was unloading pallets of electricians' kits in his capacity as a materials handler. He last worked at the

[2] Docket No. 10-823 (issued November 15, 2010). On July 8, 2008 appellant, a 49-year-old materials handler, sustained work-related sprains of the right elbow and forearm and right lateral epicondylitis while unloading pallets. He had right arm surgery on February 16, 2009 and returned to modified duty on March 2, 2009. Appellant was removed from federal employment for cause in April 2009. On September 29, 2009 OWCP denied his claim for disability compensation, noting that he was terminated for cause and not due to his inability to perform his modified-duty assignment. By separate September 29, 2009 decision, OWCP denied appellant's claim for a schedule award finding that the medical evidence submitted did not establish permanent impairment.

[3] Docket No. 12-1699 (issued February 14, 2013).

[4] A.M.A., *Guides* (6th ed. 2009).

[5] Docket No. 12-1906 (issued February 14, 2013).

[6] Docket No. 16-0669 (issued October 24, 2016).

employing establishment on February 16, 2009. By decision dated April 3, 2013, appellant was granted a schedule award for seven percent permanent impairment of the right arm.

During the pendency of appellant's most recent appeal before the Board,[7] in treatment notes dated October 28, 2015 to March 10, 2016, Dr. Brian K. Tsang, a Board-certified anesthesiologist, described monthly pain management for the accepted right upper extremity conditions.

On October 23, 2015 Dr. Leis advised that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant had eight percent right upper extremity impairment and had reached maximum medical improvement on August 6, 2015.

A January 26, 2016 magnetic resonance imaging (MRI) scan of the right elbow demonstrated osteoarthrosis, chronic partial-thickness tear bisecting the common extensor tendon with superimposed chronic lateral epicondylitis, mild chronic medial epicondylitis, mild bicipital tendinopathy, mild triceps tendinopathy, and mild ulnar neuritis. A June 7, 2016 electromyogram (EMG) study demonstrated bilateral carpal tunnel syndrome.

Beginning on April 10, 2016, pain management reports from Dr. Tsang's office were completed by Linda Bell and Ashley Burroughs, both of whom are nurse practitioners.

Dr. Leis reviewed the EMG on June 13, 2016 and diagnosed carpal tunnel syndrome. He recommended surgical release, and requested authorization for the surgery on June 29, 2016. In a treatment note dated June 21, 2016, Dr. Leis noted appellant's report of recalcitrant right arm pain worsening over the past three weeks with heavy labor. He advised that physical examination showed a significant progression in neurological symptoms from the employment injury. Dr. Leis diagnosed cubital tunnel syndrome, elbow pain, lateral epicondylitis, and carpal tunnel syndrome.

By decision dated August 30, 2016, OWCP found that the evidence of record did not support expansion of the acceptance of appellant's claim to include bilateral carpal tunnel syndrome and also denied authorization for right wrist endoscopic carpal tunnel release.

In an August 3, 2016 treatment note, submitted on October 4, 2016, Dr. Leis reiterated his conclusions reported on June 21, 2016.

In August 2016, OWCP referred appellant to Dr. Simon Finger, a Board-certified orthopedic surgeon, for a second opinion evaluation to assess the extent and degree of appellant's disability related to the July 8, 2008 employment injury. In a September 15, 2016 report, Dr. Finger noted the history of injury and appellant's report of continued right elbow pain and weakness. Following physical examination, he advised that the accepted conditions had not resolved, noting objective findings of pain with extension of the wrist and fingers, positive Tinel's at the elbow, decreased sensation in the ulnar digits, and a weak ulnar grip. Dr. Finger advised that appellant could not perform his regular job duties, but could work eight hours of restricted

[7] *Id*.

duty daily with restrictions of no overhead lifting, no repetitive motion of the right upper extremity, and a weight restriction of five pounds.

Appellant requested reconsideration of the August 30, 2016 decision denying expansion of the acceptance of his claim on September 26, 2016.

Following the Board's October 24, 2016 decision,[8] by decision dated November 22, 2016, OWCP found that the medical evidence of record did not establish that the diagnosed carpal tunnel syndrome and need for decompression surgery were causally related to the July 8, 2008 employment injury and therefore denied modification of its August 30, 2016 decision.

On December 13, 2016 appellant requested reconsideration of the November 22, 2016 decision. On December 21, 2016 he filed a schedule award claim (Form CA-7). On December 21, 2016 appellant also requested reconsideration of the schedule award issue affirmed in the October 24, 2016 Board decision.

In a December 23, 2016 treatment note, Dr. Leis reiterated his findings and conclusions. Ms. Bell completed a work capacity evaluation (Form 5c) on January 16, 2017. She advised that appellant had a permanent weight limit of five pounds. Ms. Bell and Ms. Burroughs continued to submit monthly treatment notes.

By decision dated March 13, 2017, OWCP noted that the medical evidence did not establish that the diagnosed carpal tunnel syndrome and need for decompression surgery were causally related to the July 8, 2008 employment injury and denied modification of the August 30, 2016 decision.

By decision dated March 22, 2017, OWCP found the record insufficient to establish right upper extremity permanent impairment greater than seven percent, for which appellant previously received a schedule award.

In an April 10, 2017 memorandum, OWCP asked its medical adviser to review the record for an impairment evaluation. The memorandum instructed that a clear explanation regarding calculations should be given, and, if applicable, and an explanation as to why the method of diagnosis-based impairment (DBI) or range of motion (ROM) was chosen.

On April 17, 2017 appellant requested reconsideration of the March 22, 2017 decision. On April 19, 2017 he requested reconsideration of the March 13, 2017 decision.

In a May 1, 2017 report, Dr. William Tontz, Jr., a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record for the purpose of an impairment evaluation. He concluded that, for a diagnosis of lateral epicondylitis with no significant objective abnormal findings, under Table 15-4 of the A.M.A., *Guides*, appellant had zero permanent impairment.

By decision dated May 5, 2017, OWCP denied appellant's request for reconsideration of the merits of the March 13, 2017 decision, finding the evidence submitted irrelevant or immaterial

[8] *Supra* note 6.

regarding the merit issue of whether carpal tunnel syndrome was employment related and whether surgery for the condition should be authorized.

By decision dated May 12, 2017, OWCP denied appellant's request for an additional schedule award for his right upper extremity conditions. It noted that the evidence submitted did not address additional impairment and that its medical adviser found that the evidence did not demonstrate impairment.[9]

In separate requests dated June 2, 2017, appellant requested reconsideration of the May 5 and 12, 2017 OWCP decisions. He generally asserted that he was entitled to an increased schedule award and that carpal tunnel syndrome should be accepted as a work-related condition.

In correspondence dated June 21, 2017, OWCP informed appellant that his only right of appeal from the May 5, 2017 decision was an appeal to the Board.

By decision dated June 22, 2017, OWCP denied appellant's request for reconsideration of the merits of the May 12, 2017 schedule award decision. It noted that medical evidence submitted did not address the issue of permanent impairment and, thus, was insufficient to warrant merit review of the May 12, 2017 decision.

LEGAL PRECEDENT -- ISSUE 1

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[10]

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[11]

[9] In separate May 12, 2017 correspondence, OWCP informed appellant that it appeared that he was requesting that additional conditions be accepted. It explained that the instant claim was accepted for a right arm injury that occurred on July 8, 2008, and if he believed he had additional medical conditions resulting from repetitive or cumulative work exposure, these must be addressed in a separate occupational disease claim.

[10] Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 3.05 (2014); *see Charles W. Downey*, 54 ECAB 421 (2003).

[11] *Charles W. Downey, id.*

In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof to establish that the diagnosed carpal tunnel syndrome was causally related to the July 8, 2008 employment injury.

The medical evidence that addresses carpal tunnel syndrome includes a June 7, 2016 EMG study that demonstrated bilateral carpal tunnel syndrome. This study does not address a cause of the diagnosed condition. Diagnostic studies are of limited probative value as they do not address whether the employment incident caused any of the diagnosed conditions.[13] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[14] On June 13, 2016 Dr. Leis reviewed the EMG and diagnosed carpal tunnel syndrome. He recommended surgical release and requested authorization for the study on June 29, 2016. On June 21, 2016 Dr. Leis again diagnosed carpal tunnel syndrome. He, however, did not relate appellant's diagnosed carpal tunnel syndrome in any way to the July 8, 2008 employment injury.

It is appellant's burden to establish that a consequential condition is causally related to the July 8, 2008 employment injury.[15] The record before the Board contains insufficient evidence to establish that appellant's bilateral carpal tunnel syndrome was causally related to this injury. As he has not established employment-related carpal tunnel syndrome, OWCP did not abuse its discretion in denying authorization for corrective surgery for that condition.[16]

LEGAL PRECEDENT -- ISSUE 2

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[17] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[18] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the

[12] *R.C.*, 58 ECAB 238 (2006).

[13] *See J.S.*, Docket No. 17-1039 (issued October 6, 2017).

[14] *Willie M. Miller*, 53 ECAB 697 (2002).

[15] *Charles W. Downey*, *supra* note 10.

[16] *R.C.*, *supra* note 12.

[17] *See* 20 C.F.R. §§ 1.1-1.4.

[18] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[19]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[20] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[21]

ANALYSIS -- ISSUE 2

By decision dated April 3, 2013, OWCP granted appellant a schedule award for seven percent permanent impairment of the right arm. As to whether appellant is entitled to an additional schedule award for the accepted right upper extremity conditions, the Board finds this case is not in posture for decision.

The Board has found that OWCP had inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation had been followed regarding the proper use of DBI or ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[22] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[23] In *T.H.*, the Board concluded that OWCP physicians were at odds over the proper methodology for rating upper extremity impairment, having observed that attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. The Board observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all

[19] 20 C.F.R. § 10.404; *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[20] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[21] *Isidoro Rivera*, 12 ECAB 348 (1961).

[22] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

[23] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

claimants.[24] OWCP issued FECA Bulletin No. 17-06 on May 8, 2017. It directs the rating physician and its OWCP medical adviser to calculate upper extremity permanent impairment using both the ROM and DBI methods and identify the higher rating and, if the medical evidence or record is insufficient for OWCP's medical adviser to render a ROM rating, he should advise OWCP what medical evidence is necessary to complete a rating.[25]

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the June 22, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly,[26] and after such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

In light of the Board's disposition regarding this issue, the issue of whether OWCP properly denied appellant's request for reconsideration of the merits of his claim in its June 22, 2017 decision is rendered moot.

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[27] Section 10.608(a) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(3).[28] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.[29] Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[30]

ANALYSIS -- ISSUE 3

On April 19, 2017 appellant requested reconsideration of the March 13, 2017 decision denying that the diagnosed carpal tunnel syndrome and need for decompression surgery were

[24] *Supra* note 22.

[25] FECA Bulletin No. 17-06 (issued May 8, 2017).

[26] *Id*.

[27] 5 U.S.C. § 8128(a).

[28] 20 C.F.R. § 10.608(a).

[29] *Id*. at § 10.606(b)(3).

[30] *Id*. at § 10.608(b).

causally related to the July 8, 2008 employment injury. He generally asserted that the carpal tunnel syndrome should be accepted.

The Board finds that, as appellant did not assert that OWCP erroneously applied or interpreted the law or advance a relevant legal argument not previously considered by OWCP, he was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[31]

With respect to the third above-noted requirement under section 10.606(b)(2), Ms. Bell and Ms. Burroughs submitted monthly treatment notes. Their reports, however, are not relevant as they do not constitute competent medical evidence as a nurse practitioner is not a physician under FECA.[32]

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied his reconsideration request.

CONCLUSION

The Board finds that appellant failed to establish that carpal tunnel syndrome was caused by the July 8, 2008 employment injury, and that OWCP properly denied authorization for decompression surgery. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim on these issues, pursuant to 5 U.S.C. § 8128(a). The Board also finds this case is not in posture for decision regarding the degree of impairment of appellant's right upper extremity.

[31] 20 C.F.R. § 10.606(b).

[32] *See G.A.*, Docket No. 09-2153 (issued June 10, 2010). Section 8101(2) of the FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

ORDER

IT IS HEREBY ORDERED THAT the May 5 and March 13, 2017 decisions of the Office of Workers' Compensation Programs are affirmed. OWCP decisions dated June 22, May 12, and March 22, 2017 are set aside, and the case is remanded for proceedings consistent with this decision of the Board.

Issued: April 10, 2018
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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