

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

_____)	
L.G., Appellant)	
)	
and)	Docket No. 18-0065
)	Issued: June 11, 2018
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kearny, NJ, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 18, 2017 appellant filed a timely appeal from an August 31, 2017 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.²

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of her upper extremities, warranting a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The record provided to the Board includes evidence received after OWCP issued its August 31, 2017 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

Appellant, a 65-year-old former mail processor and distribution clerk, has an accepted occupational disease claim (Form CA-2) for bilateral carpal tunnel syndrome (CTS), which arose on or about March 19, 2002. That claim was assigned OWCP File No. xxxxxx977. Appellant also has an accepted traumatic injury claim (Form CA-1) for left arm strain and cervical radiculitis due to a September 17, 2002 employment-related lifting incident. That claim was assigned OWCP File No. xxxxxx014.⁴ OWCP has administratively combined the two above-noted claims, with File No. xxxxxx014 designated as the master file.

In June 2005, appellant filed a claim for a schedule award (Form CA-7) under both of her accepted claims.

In a September 21, 2004 report, Dr. David Weiss, an attending Board-certified orthopedic surgeon and osteopath, opined that appellant had 45 percent permanent impairment of her right upper extremity under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ In an October 11, 2005 report, Dr. Andrew Hutter, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant had no permanent impairment of either upper extremity.

By decision dated November 23, 2005, OWCP denied appellant's claim for a schedule award. Appellant requested a hearing and in a February 7, 2006 decision, an OWCP hearing representative vacated the November 23, 2005 decision and remanded the case to OWCP for a resolution of a conflict in the medical opinion evidence between Dr. Weiss and Dr. Hutter.

On remand OWCP referred appellant to Dr. Ronald Gennace, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on her upper extremity permanent impairment under the fifth edition of the A.M.A., *Guides*.

An initial evaluation by Dr. Gennace, which occurred on November 14, 2006, was concluded prematurely when appellant became ill. A reevaluation was scheduled for February 27, 2007, but appellant failed to attend the examination.

By decision dated March 22, 2007, OWCP denied appellant's claim for a schedule award, determining that the medical evidence of record was insufficient to support permanent impairment of a scheduled member or function of the body.

³ Docket No. 11-0162 (issued July 20, 2011).

⁴ Appellant attributed her injury to lifting flat trays from a postal container (post-con). She reported experiencing pain in her wrist that radiated up her left arm to her neck. Effective October 4, 2002, appellant received federal retirement (disability) annuity benefits.

⁵ A.M.A., *Guides* (5th ed. 2001).

On March 28, 2007 OWCP's Branch of Hearings and Review received appellant's request for an oral hearing. On March 30, 2007 appellant, through counsel, expressed her willingness to undergo the impartial medical examination by Dr. Gennace.

Following a preliminary review, by a June 4, 2007 decision, an OWCP hearing representative set aside the March 22, 2007 decision, and remanded the case for an impartial medical examination with Dr. Gennace.

In an October 25, 2007 report, Dr. Gennace found that appellant had no permanent impairment of her upper extremities causally related to her accepted conditions.

On February 7, 2008 OWCP issued a decision denying appellant's claim for a schedule award, finding there was no permanent employment-related impairment of her upper extremities.

Appellant requested an oral hearing, which was held on May 13, 2008. By decision dated August 4, 2008, OWCP's hearing representative set aside the February 7, 2008 decision, finding that the statement of accepted facts (SOAF) provided to Dr. Gennace was incomplete in that it failed to reflect that OWCP had accepted appellant's traumatic injury claim for cervical radiculitis and did not address whether repetitive duties caused or aggravated her preexisting degenerative disc disease. The hearing representative remanded the case with instructions for OWCP to obtain a supplemental report from Dr. Gennace after providing him with an updated SOAF reflecting OWCP's acceptance of appellant's cervical radiculitis condition.

In an October 21, 2008 report, Dr. Gennace provided examination findings, which revealed no atrophy of the upper extremities, no strength loss secondary to median nerve deficiency, and full cervical range of motion. He opined that appellant's bilateral carpal tunnel syndrome had resolved, as evidenced by a recent electromyogram (EMG) and nerve conduction velocity (NCV) testing, and that her cervical radiculopathy no longer was work related. Dr. Gennace concluded that she had no permanent impairment related to her accepted condition under the fifth edition of the A.M.A., *Guides*.

On November 13, 2008 the district medical adviser reviewed Dr. Gennace's findings and determined that appellant had no ratable upper extremity permanent impairment pursuant to the provisions of the fifth edition of the A.M.A., *Guides*. He referred to the results of the February 5, 2008 EMG/NCV testing of appellant's upper extremities, which revealed no significant abnormalities.

By decision dated December 2, 2008, OWCP denied appellant's claim for a schedule award based upon Dr. Gennace's October 21, 2008 report.

Appellant, through counsel, timely requested an oral hearing, which was held before an OWCP hearing representative on May 19, 2009. In a July 6, 2009 decision, the hearing representative affirmed the December 2, 2008 decision. He found that Dr. Gennace's opinion, which was well rationalized and based on an accurate medical and factual background, established that appellant had no permanent impairment of her upper extremities causally related to her accepted work injuries.

On July 6, 2010 appellant, through counsel, requested reconsideration. Counsel contended that Dr. Gennace's referee report was not well reasoned. He contended that the evidence did not support Dr. Gennace's conclusion that appellant's carpal tunnel syndrome condition had resolved.

By decision dated August 17, 2010, OWCP denied appellant's request for reconsideration, finding that the evidence and argument presented were insufficient to warrant merit review.

Appellant appealed to the Board. In a July 20, 2011 decision, the Board affirmed the August 17, 2010 nonmerit decision of OWCP.⁶

On August 25, 2015 appellant again filed a claim for compensation (Form CA-7) seeking a schedule award.

By decision dated October 9, 2015, OWCP denied appellant's claim for a schedule award, finding that she failed to submit a permanent impairment rating that was calculated in accordance with the standards of the sixth edition of the A.M.A., *Guides*.⁷

Appellant disagreed with the October 9, 2015 decision and requested a hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on July 7, 2016, she testified that she continued to have pain due to her work injuries.

By decision dated August 25, 2016, OWCP's hearing representative affirmed the October 9, 2015 decision, noting that the medical evidence of record did not contain an explanation as to how any currently established medical condition or permanent impairment was causally related to the accepted work injuries.

On November 4, 2016 appellant requested reconsideration of the August 25, 2016 decision.

In a January 11, 2017 letter, OWCP advised appellant that, since she did not submit any relevant evidence not previously considered in support of her claim for a schedule award, her request was not being reviewed on the merits. It informed her that any future request for reconsideration had to be made within one year of the August 25, 2016 decision.

On May 15, 2017, under OWCP File No. xxxxxx014, appellant again filed a claim for a schedule award (Form CA-7).

By decision dated July 14, 2017, OWCP denied appellant's claim, finding that she had not established permanent impairment of her upper extremities as she had not submitted a permanent impairment rating calculated in accordance with the sixth edition of the A.M.A., *Guides*.⁸

⁶ *Supra* note 3.

⁷ A.M.A., *Guides* (6th ed. 2009).

⁸ *Id.*

On August 24, 2017 appellant requested reconsideration of the July 14, 2017 decision.

In an August 1, 2017 report, Dr. Neil Sinha, an attending Board-certified pain medicine physician, indicated that appellant was involved in a work-related injury that resulted in permanent injuries to the cervical spine. He discussed MRI scans of the cervical spine dated June 28, 2010 and April 21, 2014 and indicated that EMG and NCV testing of the upper extremities revealed carpal tunnel syndrome. Dr. Sinha noted that appellant had reached maximum medical improvement (MMI), diagnosed cervical radiculopathy and cervical spondylosis, and opined that appellant sustained work-related permanent injuries to her cervical spine that prevented her from holding objects.

Appellant also submitted an April 21, 2014 MRI scan of the cervical spine, June 16, 2017 EMG and NCV test findings for the upper extremities, a July 5, 2017 report from Dr. Dev Sinha, an attending Board-certified physical medicine and rehabilitation physician, and a July 11, 2017 report from Dr. Dipan Patel, an attending Board-certified internist.

In an August 31, 2017 decision, OWCP denied modification of its July 14, 2017 decision, noting that appellant had not submitted probative medical evidence establishing that she had work-related permanent impairment of her upper extremities.

LEGAL PRECEDENT

An employee seeking compensation under FECA⁹ has the burden of proof to establish the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged, and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.¹⁰ The schedule award provisions of FECA¹¹ and its implementing regulations¹² 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 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.¹³ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.¹⁴

⁹ *Supra* note 1.

¹⁰ *See Bobbie F. Cowart*, 55 ECAB 476 (2004).

¹¹ 5 U.S.C. § 8107.

¹² 20 C.F.R. § 10.404 (1999).

¹³ *Id.*

¹⁴ FECA Bulletin No. 09-03 (issued March 15, 2009).

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.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

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹⁷ For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁸ Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.¹⁹

ANALYSIS

The Board finds that appellant has failed to establish work-related permanent impairment of her upper extremities.

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome, left arm strain, and cervical radiculopathy. Appellant claimed entitlement to schedule award compensation permanent impairment of her upper extremities.

OWCP had determined that there was a conflict in the medical opinion evidence between Dr. Weiss, an attending physician, and Dr. Hutter, an OWCP referral physician, on the issue of whether appellant had permanent impairment of her upper extremities. In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Gennace, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In an October 21, 2008 report, Dr. Gennace provided examination findings, which revealed no atrophy of the upper extremities, no strength loss secondary to median nerve deficiency, and full cervical range of motion. He opined that appellant's bilateral carpal tunnel syndrome had resolved, as evidenced by a recent EMG and NCV testing, and that her cervical radiculopathy no longer was work related. Dr. Gennace concluded that she had no permanent impairment related to her accepted conditions under the fifth edition of the A.M.A., *Guides*.

¹⁵ See A.M.A., *Guides* 449, Table 15-23.

¹⁶ A survey completed by a given claimant, known by the name *QuickDASH* (Disabilities of the Arm, Shoulder, and Hand), may be used to determine the function scale score. *Id.* at 448-49.

¹⁷ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁸ *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹⁹ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

The Board notes that the well-rationalized report of opinion by Dr. Gennace represented the special weight of the medical evidence with respect to appellant's upper extremity permanent impairment around the time it was produced.²⁰ The Board further notes that, beginning in May 1, 2009, the sixth edition of the A.M.A., *Guides* became effective.²¹ Appellant continued to claim entitlement to schedule award compensation for permanent impairment of her upper extremities during the effective period of the sixth edition of the A.M.A., *Guides*.

The Board finds that appellant has not submitted probative medical evidence containing a rating for permanent impairment of her upper extremities derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

Appellant submitted an April 21, 2014 MRI scan of the cervical spine, June 16, 2017 EMG and NCV test findings for the upper extremities, a July 5, 2017 report from Dr. Dev Sinha, and a July 11, 2017 report from Dr. Patel. However, these documents are of no probative value regarding appellant's schedule award claim because they do not contain an impairment rating derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*.²²

In an August 1, 2017 report, Dr. Neil Sinha indicated that appellant was involved in a work-related injury that resulted in permanent injuries to the cervical spine. He discussed MRI scans of the cervical spine dated June 28, 2010 and April 21, 2014 and indicated that EMG and NCV testing of the upper extremities revealed carpal tunnel syndrome. Dr. Sinha noted that appellant had reached MMI, diagnosed cervical radiculopathy and cervical spondylosis, and opined that appellant sustained work-related permanent injuries to her cervical spine that prevented her from holding objects. This report also is of no probative value regarding appellant's schedule award claim because it does not contain an impairment rating derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*.²³

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish permanent impairment of her upper extremities, warranting a schedule award.

²⁰ *Id.*

²¹ *See supra* note 10.

²² *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

²³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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