United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
	)	**Docket No. 18-0632**
and	)	**Issued: October 19, 2018**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Westhampton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
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 February 1, 2018 appellant, through counsel, filed a timely appeal from an August 14, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish more than two percent permanent impairment of each upper extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

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

On March 7, 2007 appellant, then a 50-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome due to his federal employment duties, which included casing mail.

OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent an authorized left carpal tunnel release on March 10, 2008 and an authorized right carpal tunnel release on March 31, 2008. OWCP issued a schedule award on October 19, 2009 for four percent permanent impairment of each upper extremity. On January 31, 2013 it issued a schedule award for an additional one percent permanent impairment of each upper extremity, for a total of five percent.

Appellant, through counsel, requested a hearing. A hearing was held on May 29, 2013. By decision dated October 17, 2013, the hearing representative set aside the January 31, 2013 schedule award decision due to an unresolved conflict in the medical opinion evidence regarding whether appellant had an additional permanent impairment of either upper extremity.

On remand OWCP referred appellant to Dr. John P. Nolan, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on Dr. Nolan's March 11 and July 2, 2014 reports, by decision dated March 18, 2015, OWCP found that appellant had sustained only two percent permanent impairment of each upper extremity, and that the additional three percent previously awarded constituted an overpayment of compensation.

On August 5, 2015 appellant, through counsel, appealed to the Board. By decision dated February 9, 2016,[4] the Board set aside OWCP's March 18, 2015 decision, finding that the case was not in posture for a decision as Dr. Nolan's opinion was equivocal and therefore insufficient to carry the special weight afforded to an impartial medical examiner. The Board remanded the case to OWCP for further development, to include the appointment of a new impartial medical examiner regarding the appropriate percentage of permanent impairment of each of appellant's upper extremities. The Board further found that the issues of whether OWCP properly determined an overpayment of schedule award compensation and whether OWCP properly denied waiver of

[3] Docket No. 15-1694 (issued February 9, 2016).

[4] *Id.*

recovery of the overpayment were not in posture for decision as it was premature to address those issues before the proper percentage of permanent impairment was determined.

Counsel subsequently submitted a February 29, 2016 letter requesting that OWCP document the selection process of the new impartial medical examiner. He requested that OWCP provide the names of three qualified specialists in appellant's commuting area so that appellant could choose from among them.

The case record contains a bypass history for searches performed using the Medical Management Application (MMA). Of the 94 entries, 75 were bypassed as the physician did not accept patients from the Department of Labor (DOL), 12 were bypassed as the telephone number was disconnected or incorrect, and two were bypassed as appellant had either been examined by that physician or another physician in the same practice. Additionally, one physician did not evaluate the upper extremities, one was deceased, one was located outside the permitted traveling distance, and one physician was unavailable due to performing surgery.

OWCP telephoned Dr. Joseph Albert Abboud, a Board-certified orthopedic surgeon, on April 1, 2016, then at two of his other offices on May 10, 2016. It noted that it received "different answers" from Dr. Abboud's three offices as to why he could not examine appellant, including that the practice did not accept DOL patients, only treated certain conditions, or required payment prior to the examination. On May 10, 2016 administrative staff at two of Dr. Abboud's practices indicated that he did "not accept DOL patients." OWCP telephoned Dr. Paul Pollice, a Board-certified orthopedic surgeon, at 8:20 a.m. on June 21, 2016, noting that it had obtained a telephone number from an information service as there was none in the MMA. It had left several messages for appellant's case "and others and to this date no one called back." OWCP then contacted the next physician in the MMA list at 8:20 a.m.

On an Appointment Schedule Notification form (Form ME023) dated August 25, 2016, OWCP noted its selection of Dr. Lawrence Weiss, a Board-certified orthopedic surgeon, as impartial medical examiner.

In a letter dated September 22, 2016, counsel again requested that OWCP document that Dr. Weiss was properly selected as impartial medical examiner.

Dr. Weiss provided an October 6, 2016 report in which he reviewed the medical record and an updated statement of accepted facts (SOAF). He provided appellant a *Quick*DASH (Disabilities of the Arm, Shoulder, and Hand) questionnaire which was scored at 25. Appellant related that he had no pain, intermittent numbness, and no functional limitations in activities of daily living. On examination, Dr. Weiss found negative Tinel's and Phalen's signs at the carpal tunnel bilaterally, no thenar atrophy, asymptomatic arthritis of the metacarpophalangeal joint and wrists bilaterally, full flexion and extension of all digits, a prior left index finger amputation from a table saw, no grip weakness, wrist flexion and extension at 60 degrees on the right and 50 degrees on the left, pronation and supination at 75 degrees bilaterally, radial deviation at 20 degrees bilaterally, and ulnar deviation at 40 degrees bilaterally. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*),[5]

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

Dr. Weiss opined that, according to Table 15-21,[6] appellant had a class 1 median nerve impairment due to status post bilateral carpal tunnel releases, with an impairment range of one to three percent. According to Table 15-23,[7] he found a grade modifier for functional history (GMFH) of 1, a grade modifier for findings on physical examination (GMPE) of 2, and a grade modifier for clinical studies (GMCS) of 1. Dr. Weiss averaged these modifiers to equal 1.33, rounded down to one, to equal a one percent impairment of each upper extremity. The *Quick*DASH score of 25 provided an additional percentage point, for a final rating of two percent permanent impairment of each upper extremity. Dr. Weiss noted that this was a similar percentage to that arrived at by Dr. Nolan two years prior.

In a January 11, 2017 report, an OWCP district medical adviser (DMA) reiterated that Dr. Nolan's 2014 reports could not represent the special weight of the medical opinion as he did not properly apply or explain his use of Table 15-23.

In a memorandum dated January 19, 2017, OWCP requested the DMA review Dr. Weiss' report and impairment rating. The DMA responded in a January 20, 2017 report that Dr. Weiss properly applied the A.M.A., *Guides* in finding two percent permanent impairment of each upper extremity. He opined that the date of maximum medical improvement was October 6, 2016, the date of Dr. Weiss' impartial medical examination.

By decision dated January 30, 2017, OWCP found that appellant was not entitled to an additional schedule award as the weight of the medical evidence, as represented by Dr. Weiss, indicated only two percent impairment of each upper extremity, which was less than the five percent previously awarded.

On February 7, 2017 counsel requested an oral hearing before an OWCP hearing representative. In a letter dated May 17, 2017, he requested a review of the written record in lieu of an oral hearing. Counsel argued that OWCP's January 30, 2017 decision must be vacated as Dr. Weiss provided an identical impairment rating based on the same discredited rationale originally offered by Dr. Nolan.

By decision dated August 14, 2017, an OWCP hearing representative affirmed the January 30, 2017 decision, finding that the medical evidence of record was insufficient to establish more than two percent permanent impairment of each upper extremity. The hearing representative found that Dr. Weiss properly applied the appropriate portions of the A.M.A., *Guides* to his clinical findings, and that the DMA had confirmed the correctness and completeness of this rating. The hearing representative noted that OWCP should consider reissuing a preliminary overpayment determination to ensure due process.

[6] Table 15-21, page 438 of the A.M.A., *Guides* is titled "Peripheral Nerve Impairment: Upper Extremity Impairments," Median Nerve, Below midforearm.

[7] Table 15-23, page 449 of the A.M.A., *Guides* is titled "Entrapment/Compression Neuropathy Impairment."

LEGAL PRECEDENT

An employee seeking compensation under FECA[8] 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.[9] The schedule award provisions of FECA[10] and its implementing regulations[11] 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.[12] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[13]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[14] 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.[15]

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.[16] For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[17] Where OWCP has referred the case to an impartial medical examiner to resolve a

[8] *Supra* note 2.

[9] *See Bobbie F. Cowart*, 55 ECAB 476 (2004).

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404 (1999).

[12] *Id.*

[13] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[14] *See* A.M.A., *Guides* 449, Table 15-23. *See also L.G.*, Docket No. 18-0065 (issued June 11, 2018).

[15] A survey completed by a given claimant, known by the name *Quick*DASH, may be used to determine the function scale score. *Id.* at 448-49.

[16] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[17] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

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.[18]

ANALYSIS

The Board finds that appellant has not established more than two percent permanent impairment of each upper extremity, for which he previously received schedule award compensation.

On February 9, 2016 the Board remanded the case to OWCP to obtain a new impartial medical opinion regarding the appropriate percentage of permanent impairment to the upper extremities caused by accepted bilateral carpal tunnel syndrome.

On remand of the case, OWCP properly selected Dr. Weiss as the impartial medical examiner using the MMA. Dr. Weiss provided an October 26, 2016 report in which he reviewed the medical record, an updated SOAF, and noted detailed findings on clinical examination. Referring to Table 15-21, addressing peripheral nerve impairment in the upper extremity in the median nerve below the mid-forearm, Dr. Weiss found a class 1 diagnosis-based impairment for bilateral carpal tunnel syndrome status post median nerve release. He then utilized Table 15-23, "Entrapment/Compression Neuropathy Impairment," to specify a GMFH of 1, a GMPE of 2, and a GMCS of 1. Dr. Weiss averaged these modifiers to equal 1.33, rounded downward to one, equaling one percent permanent impairment of each upper extremity. He then added an additional percent for a *Quick*DASH score of 25, resulting in a final rating of two percent permanent impairment of each upper extremity. In a January 20, 2017 report, an OWCP DMA concurred with Dr. Weiss' impairment rating, application of the A.M.A., *Guides*, and method of calculation.

The Board finds that OWCP properly accorded the special weight of the medical evidence to the well-reasoned report of Dr. Weiss.[19] Appellant has not submitted probative medical evidence establishing greater permanent impairment of his upper extremities using the A.M.A., *Guides*. As such, he has not met his burden of proof.

On appeal counsel contends that there is an unresolved conflict of medical opinion between Dr. Weiss, who found no thenar atrophy, and Dr. Nolan, who found a GMPE of 1 for thenar atrophy. The Board notes that a conflict of medical opinion refers to a difference of reasoning between an attending physician and a medical specialist examining a claimant on behalf of the government. As Dr. Nolan and Dr. Weiss were both selected as impartial medical examiners, there can be no conflict between them under 5 U.S.C. § 8123(a). Counsel also asserts that Dr. Weiss' opinion is unreliable as it is based on the same reasoning and methods of calculation as those offered by Dr. Nolan, whose opinion was discredited by the Board. As set forth above, unlike Dr. Nolan, Dr. Weiss based his opinion on a proper application of the A.M.A., *Guides* and provided sufficient rationale in support of his opinion.

[18] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[19] *Id.*

Counsel also argues that Dr. Weiss cannot serve as impartial medical examiner as he was not properly selected by OWCP. He contends that OWCP improperly bypassed Dr. Pollice because the bypass log indicates only one call to him but the notes reflect that OWCP had left several messages. Counsel argues that OWCP procedures require the scheduler to "allow the physician's office a minimum of two business hours to allow for a returned call." The Board notes, however, that the complete bypass note states that OWCP had left "several messages for this case and others," which clearly refers to a number of calls over time. There is no dispositive evidence that OWCP failed to conform to its procedures. Counsel also asserts that Dr. Abboud was improperly bypassed because administrative staff at his three different practices gave OWCP conflicting answers as to why he could not examine appellant. The Board notes that the lack of absolute uniformity in the answers OWCP received to its three attempts to contact Dr. Abboud indicate an issue with the physician's office staff, not OWCP.

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 has not established more than two percent permanent impairment of each upper extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 14, 2017 is affirmed.

Issued: October 19, 2018
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