United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 21-0136**
	)	**Issued: March 28, 2022**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 2, 2020 appellant filed a timely appeal from an October 8, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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 this case.[3]

[1] On November 2, 2020 appellant also filed an appeal from a purported October 1, 2020 decision of OWCP. However, the October 1, 2020 document is a proposed termination notice rather than a final decision of OWCP. The only final adverse decision over which the Board may exercise jurisdiction is the October 8, 2020 merit decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the October 8, 2020 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.[4] 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 April 24, 2013 appellant, then a 31-year-old automation clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 14, 2013 she sustained an injury to her neck and back area when she engaged in reaching and lifting duties while in the performance of duty.[5] She stopped work on April 22, 2013. OWCP accepted that appellant sustained aggravation of preexisting cervical spondylosis and paid appellant wage-loss compensation for disability from work commencing April 22, 2013 on the supplemental rolls and commencing December 15, 2013 on the periodic rolls.

On January 15, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award due to her accepted April 14, 2013 employment injury. In support of her claim, she submitted an October 28, 2014 report in which Dr. Jonathan Nissanoff, a Board-certified orthopedic surgeon, determined that she had a 30 percent "combined whole person impairment rating."

By decision dated March 11, 2015, OWCP denied appellant's claim for a schedule award.

By decision dated October 22, 2015, OWCP denied modification of the March 11, 2015 decision. On April 7, 2016 appellant requested reconsideration and submitted additional evidence. By decision dated April 14, 2016, OWCP denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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[4] Docket No. 15-1437 (issued May 9, 2016).

[5] Based on the description of injury, appellant's claim was converted to an occupational disease claim (Form CA-2) because the employment activities occurred over a period longer than one workday or shift. A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift, whereas an occupational disease refers to an injury produced by employment over a period longer than a single workday or shift. 20 C.F.R. §§ 10.5(q), (ee), respectively; *R.V.*, Docket No. 18-1037 (issued March 26, 2019); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

Appellant also appealed to the Board and, by decision dated May 9, 2016,[6] the Board affirmed the decision.[7]

In a July 25, 2018 report, Dr. Kamshad Raiszadeh, a Board-certified orthopedic surgeon, determined that appellant had zero percent permanent impairment of the upper extremities stemming from the cervical spine. He noted that, although an electromyogram/nerve conduction velocity (EMG/NCV) study suggested mild carpal tunnel syndrome and an ulnar condition, there was no frank neurologic evidence of either condition upon which to rate a diagnosis-based impairment. Dr. Raiszadeh referenced symptoms of pain in appellant's wrists and found one percent permanent impairment of each upper extremity due to the reported symptoms by utilizing Table 15-2 (Wrist Regional Guide) on page 395 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[8]

In an October 22, 2018 report, Dr. David M. Kupfer, a Board-certified orthopedic surgeon, indicated that appellant had a history of bilateral carpal tunnel syndrome and left ulnar neuropathy. A February 15, 2019 EMG/NCV study found no sensory or motor findings emanating from the cervical spine. The study revealed mild findings in the ulnar and median nerves.

On April 17, 2019 OWCP referred appellant's medical record to Dr. Herbert White, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested an opinion on permanent impairment utilizing *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. In an April 22, 2019 report, Dr. White discussed the diagnostic testing of record and opined that there was no evidence of compression of the cervical spine. He concluded that, under *The Guides Newsletter*, there was no spinal nerve root abnormality that would result in a ratable upper extremity impairment.

On May 7, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and series of questions, for a second opinion examination and evaluation with Dr. Jon P. Kelly, a Board-certified orthopedic surgeon. It requested an opinion on permanent impairment utilizing *The Guides Newsletter*. In a July 17, 2019 report, Dr. Kelly discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted atypical and equivocal medical findings without regard to any true ulnar or carpal tunnel condition. Dr. Kelly reported that appellant exhibited normal upper extremity sensory and motor findings.[9] He indicated that she had subjective complaints of possible radicular symptoms of the upper extremities, but advised that the diagnostic testing of record, including a magnetic

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[6] *Supra* note 4.

[7] Appellant also appealed January 2 and 27 and June 8, 2015 merit decisions of OWCP, which the Board affirmed in its May 9, 2016 decision, but the subject matters of these decisions are not currently before the Board.

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

[9] Dr. Kelly indicated that appellant had reached maximum medical improvement (MMI) by the date of his examination.

resonance imaging (MRI) scan of the cervical spine, did not demonstrate evidence of neural impingement. Dr. Kelly determined that, therefore, appellant did not have a ratable permanent impairment of the upper extremities under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.

On August 28, 2019 OWCP again referred appellant's case to Dr. White in his capacity as a DMA. In a September 10, 2019 report, Dr. White found that she did not have a ratable permanent impairment of the upper extremities. He expressed his agreement with the conclusions of Dr. Kelly.

By decision dated September 16, 2019, OWCP denied appellant's schedule award claim, finding that she did not meet her burden of proof to establish permanent impairment of a scheduled member or function of the body.

On October 14, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing, held on February 12, 2020, she argued that she had permanent impairment of her upper extremities due to bilateral carpal tunnel syndrome and a cubital tunnel condition.

Appellant submitted additional medical evidence, including September 19 and 30, 2019 reports from Dr. Kupfer who diagnosed cervical disc disorder with radiculopathy, history of bilateral carpal tunnel syndrome, and left ulnar radiculopathy at the cubital tunnel with intermittent ulnar nerve subluxation.

By decision dated April 28, 2020, OWCP's hearing representative affirmed the September 16, 2019 decision, finding that appellant failed to establish an upper extremity impairment emanating from the cervical spine.

On July 10, 2020 appellant requested reconsideration of the April 28, 2020 decision.

Appellant submitted additional medical evidence, including May 19 and June 4, 2020 reports from Dr. Enass Rickards, a Board-certified orthopedic surgeon. In these reports, Dr. Rickards diagnosed bilateral carpal tunnel syndrome and left ulnar nerve lesion. A June 1, 2020 EMG/NCV study showed a left ulnar neuropathy with conduction block between the elbow and wrist.

On July 16, 2000 OWCP referred appellant, along with an updated SOAF and a series of questions, for a second opinion examination and evaluation with Dr. William P. Curran, a Board-certified orthopedic surgeon. It requested that he provide an opinion on whether she continued to have residuals of her accepted April 22, 2013 employment injury.

In a September 1, 2020 report, Dr. Curran discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that the cervical compression test he conducted was negative and that she did not exhibit spasms in her cervical spine. The Phalen's test was positive in both wrists. Dr. Curran diagnosed, *inter alia*, cervical strain, and clinical and electrical evidence of left cubital tunnel syndrome. He opined that

the June 1, 2020 EMG/NCV study of appellant's upper extremities was negative for bilateral carpal tunnel syndrome and he found no objective findings of the accepted condition of cervical spondylosis. Dr. Curran noted that the most recent cervical MRI scan, dated March 8, 2019, was entirely within normal limits. He found evidence of a left cubital tunnel syndrome, which caused numbness, tingling, and weakness of digits four and five of the left hand, but indicated that this was a nonindustrial condition. Dr. Curran advised that appellant had reached MMI.

By decision dated October 8, 2020, OWCP denied modification of the April 28, 2020 decision.

LEGAL PRECEDENT

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, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[12] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[13]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[14] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[15] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[16]

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[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *Id. See also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

[14] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[15] *Supra* note 13 at Chapter 2.808.5c(3) (March 2017).

[16] *Supra* note 13 at Chapter 3.700, Exhibit 4 (January 2010).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In his July 17, 2019 report, Dr. Kelly discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted atypical and equivocal medical findings without regard to any true ulnar or carpal tunnel condition. Dr. Kelly reported that appellant exhibited normal upper extremity sensory and motor findings. He indicated that she had subjective complaints of possible radicular symptoms of the upper extremities, but advised that the diagnostic testing of record, including an MRI scan of the cervical spine, did not demonstrate evidence of neural impingement. Dr. Kelly determined that, therefore, appellant did not have a ratable permanent impairment of the upper extremities under the sixth edition of the A.M.A., *Guides*. Moreover, Dr. White, a DMA, found in a September 10, 2019 report that she did not have a ratable permanent impairment of the upper extremities. Dr. White expressed his agreement with the conclusions of Dr. Kelly.[17]

Appellant has not submitted probative medical evidence establishing ratable permanent impairment of the upper extremities. The Board has held that an opinion on permanent impairment is of little probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.[18]

Appellant submitted a July 25, 2018 report from Dr. Raiszadeh who referenced symptoms of pain in her wrists and found one percent permanent impairment of each upper extremity due to the reported symptoms by utilizing Table 15-2 on page 395 of the sixth edition of the A.M.A., *Guides*.[19] However, OWCP has not accepted an employment-related wrist condition. Moreover, Dr. Raiszadeh's report is of little probative value because he has not adequately explained how the employment-related conditions resulted in a ratable impairment under the A.M.A., *Guides*.[20] In addition, he acknowledged in the same report that appellant had zero percent permanent impairment of the upper extremities stemming from her cervical spine. Dr. Raiszadeh also noted that, although an EMG/NCV study suggested mild carpal tunnel syndrome and an ulnar condition, there was no frank neurologic evidence of either condition upon which to rate a diagnosis-based impairment. The Board notes that neither of these conditions has been accepted by OWCP.

The Board finds that OWCP properly relied on the opinion of Dr. Kelly, an OWCP referral physician, in denying appellant's schedule award claim. Dr. Kelly's comprehensive and well-

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[17] The Board notes that Dr. Curran, an OWCP referral physician, indicated in a September 1, 2020 report that he found no objective findings of the accepted condition of cervical spondylosis. OWCP did not ask him to comment on permanent impairment.

[18] *See N.A.*, Docket No. 19-0248 (issued May 17, 2019); *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

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

[20] *See supra* note 19.

rationalized July 17, 2019 report constitutes the most recent assessment of her upper extremity impairment and represents the weight of the medical evidence with respect to the matter.

Appellant may request a 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 met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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