United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 23-0439**
	)	**Issued: September 18, 2023**
U.S. POSTAL SERVICE, NEWARK POST OFFICE, Newark, NJ, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On February 9, 2023 appellant, through counsel, filed a timely appeal from an August 31, 2022 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 this 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 her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On November 11, 1993 appellant, then a 34-year-old letter sorting machine clerk, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome due to factors of her federal employment, including continuously keying the letter sorting machine while at work. She noted that she first became aware of her condition on April 13, 1993 and first realized its relationship to her federal employment on July 6, 1993. On April 12, 1994 OWCP accepted appellant's claim for right carpal tunnel syndrome.[3]

On September 14, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support of her claim, appellant submitted a May 26, 2021 impairment evaluation report by Dr. Albert Johnson, a Board-certified neurologist, who reviewed her medical records and recounted her current complaints of right hand pain and stiffness. Dr. Johnson noted that an electromyogram and nerve conduction velocity (EMG/NCV) study of the upper extremities dated January 25, 1995, revealed right carpal tunnel syndrome. Physical examination of appellant's right wrist revealed range of motion (three times) supination of 90 degrees, 90 degrees, 90 degrees; pronation of 90 degrees, 90 degrees, 90 degrees; ulnar deviation of 35 degrees, 35 degrees, 35 degrees; radial deviation of 25 degrees, 25 degrees, 25 degrees; dorsiflexion of 90 degrees, 90 degrees, 90 degrees; and palmar flexion of 90 degrees, 90 degrees, 90 degrees. Dr. Johnson noted all fingers cascade normally and touch the distal palmar crease, she was able to touch the tip of the thumb to all four digits of the distal palmar crease at the periphery, thenar atrophy was present, symmetrical gross power of adductor and abductors, symmetrical thenar and hyperthenar function, negative Tinel's and Phalen's sign, and intact Semmes-Weinstein monofilament testing. He diagnosed repetitive occupational syndrome producing strain and sprain of lumbar spine, disc bulge at L4-L5 and L5-S1, subligamentous disc herniation at L5-S1, sprain/strain of the left hip, aggravation of underlying degenerative arthritis, repetitive occupational syndrome with strain and sprain of right wrist, and right carpal tunnel syndrome. Dr. Johnson opined that the cumulative and repetitive occupational trauma sustained by the April 13, 1993 employment injury, was the competent producing factors for the claimant's subjective and objective findings.

Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] Dr. Johnson utilized the diagnosis-based impairment (DBI) rating method for appellant's entrapment neuropathy of the right median nerve at the wrist under Table 15-23 (Entrapment/Compression Neuropathy Impairment), page 449. He

[3] On May 27, 1997 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because her April 13, 1993 employment injury had resolved. By decision dated July 21, 1997, it finalized the termination of appellant's wage-loss compensation and medical benefits, effective July 17, 1997.

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

assigned a grade modifier for functional history (GMFH) of 3, a grade modifier for physical examination (GMPE) of 3, and a grade modifier for clinical studies (GMCS) of 1. Dr. Johnson calculated that appellant had five percent permanent impairment of the right upper extremity. He reported that appellant reached maximum medical improvement (MMI) on May 26, 2021.

OWCP received additional evidence. Dr. Bhudev Sharma, a specialist in internal medicine and cardiology, treated appellant on February 21, 1994 for right wrist and hand pain. Appellant reported being treated by an orthopedist who diagnosed carpal tunnel syndrome based on nerve conduction studies that showed mild neuropathy. She continued light-duty work.

An October 12, 1994 EMG/NCV study revealed "somewhat prolonged distal median sensory latencies, consistent with mild carpal tunnel syndrome." An EMG/NCV study dated January 25, 1995 revealed "worsening carpal tunnel syndrome (more prolonged distal median sensory latencies compared to 10/12/94 study)." An October 11, 1996 EMG/NCV study was normal and revealed no electrodiagnostic evidence of carpal tunnel syndrome or peripheral neuropathy in the upper extremities.

Dr. Smita Modi, a Board-certified neurologist, treated appellant on January 26, March 17, March 31, November 8, November 16, 1995, for pain, paresthesia, and numbness along her ring and little finger of both hands present since September 21, 1994. She noted that appellant's electrodiagnostic studies confirmed carpal tunnel syndrome and prescribed a splint, physical therapy, and continued disability from work. On July 17, 1997 Dr. Modi returned appellant to work with restrictions.

On March 12 and 24, 1997 Dr. Bilal A. Mian, a Board-certified neurologist, diagnosed cervical sprain/strain, chronic radiculopathy, herniated nucleus pulposus at C5-6, and possible depression. He noted appellant's complaints of numbness, weakness, and paresthesia were generalized and very vague, and opined that her symptoms may be caused by a cervical injury and functional overlay. Dr. Mian noted the neurological examination was within normal limits except subjective complaints of sensory loss that did not follow any particular pattern of a nerve or root, reflexes were intact, no unusual wasting was present, and Tinel's sign was negative. He further noted that the EMG/NCV studies were unremarkable and fell within normal limits including distal latencies.

On January 12, 2022 OWCP routed Dr. Johnson's May 26, 2021 report, a statement of accepted facts (SOAF), and the case file to Dr. David J. Slutsky, a Board-certified orthopedist, serving as OWCP's district medical adviser (DMA), for review and a determination of permanent impairment of appellant's upper extremity under the A.M.A., *Guides*, and her date of MMI. It requested that the DMA, review Dr. Johnson's May 26, 2021 report and explain whether he agreed with his findings.

In a report dated February 1, 2022, the DMA, Dr. Slutsky, indicated that he reviewed the SOAF and the medical record. He referred to the range of motion (ROM) method of the A.M.A., *Guides*,[5] he utilized Table 15-32, Table 15-35, and Table 15-36 to determine that she had zero

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

percent permanent impairment of the right upper extremity due to limited ROM of the right wrist.[6] The DMA related that her right carpal tunnel impairment was rated under the DBI method for nonspecific wrist pain as her right median nerve measurements did not meet the criteria for measurement under Table 15-23, page 449 of the A.M.A., *Guides* for entrapment compression neuropathy. Utilizing Table 15-3, page 395, he identified the class of diagnosis (CDX) for the diagnosis of nonspecific wrist pain as a Class 1 impairment. The DMA assigned a GMFH of 1, in accordance with Table 15-7, page 406, as appellant had complaints of daily wrist pain and no *Quick*DASH score. He found that a GMPE and a GMCS were not applicable. The DMA utilized the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = -1, which resulted in grade A, or zero percent permanent impairment of the right upper extremity. He disagreed with Dr. Johnson's impairment rating provided on May 26, 2021 noting that he improperly rated appellant pursuant to Table 15-23, page 449 of the A.M.A., *Guides* for entrapment compression neuropathy. The DMA noted that the EMG/NCV studies dated October 12, 1994 and October 11, 1996 were negative and a January 25, 1995 study revealed mild carpal tunnel syndrome. The DMA further stated that pursuant to the A.M.A., *Guides*, page 445:

> "[T]he diagnosis of focal neuropathy syndrome must be documented by sensory and motor nerve conduction studies and/or needle EMG as stated in appendix 15-B in order to be a ratable impairment. If a nerve conduction test is not performed or does not meet [the] … diagnostic criteria, there is no ratable impairment from the section."

In this instance, the three EMG/NCV studies did not meet the diagnostic criteria and therefore, there was no ratable impairment using this section. The DMA opined that appellant reached MMI on May 26, 2021.

By decision dated February 14, 2022, OWCP denied appellant's schedule award claim.

On February 22, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on June 21, 2022.

By decision dated August 31, 2022, OWCP's hearing representative affirmed the February 14, 2022 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing regulations[8] 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A.,

[6] A.M.A., *Guides* 473, Table 15-32; 477, Table 15-35; 477, Table 15-36.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

Guides as the uniform standard applicable to all claimants and the Board has concurred in such adoption.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[10]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[11] In Table 15-23, grade modifiers levels (ranging from zero to four) are described for the categories of 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 based on functional scale, an assessment of impact on daily living activities.[12]

In addressing upper extremity impairments, the sixth edition requires identification of the CDX, which is then adjusted by GMFH, GMPE, and GMCS.[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[14]

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

> "Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the [A.M.A.,] Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used*." (Emphasis in the original.)[15]

The Bulletin further advises:

> "If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allows for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE [claims examiner]. If the medical evidence

[9] *Id.* at § 10.404(a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] A.M.A., *Guides* (6th ed. 2009) at 449.

[12] *Id.* at 448-49.

[13] *Id.* at 383-492.

[14] *Id.* at 411.

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

> of record is [in]sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."[16]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to its DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[17]

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 May 26, 2021 report, Dr. Johnson, appellant's attending orthopedist, determined that appellant had five percent permanent impairment of the right upper extremity due to her accepted right carpal tunnel syndrome. He utilized the DBI rating method for appellant's entrapment neuropathy of the right median nerve at the wrist and found that, under Table 15-23 page 449, she had a GMFH of 3, a grade GMPE of 3, and a GMCS of 1. Dr. Johnson calculated that appellant had five percent permanent impairment of the right upper extremity.

In a February 1, 2022 report, the DMA, Dr. Slutsky, reviewed Dr. Johnson's May 26, 2021 report and disagreed with his finding that appellant had five percent permanent impairment of the right upper extremity for carpal tunnel syndrome. He noted that Dr. Johnson improperly rated appellant pursuant to Table 15-23, for entrapment compression neuropathy despite the fact that her right median nerve measurements did not meet the criteria for measurement under Table 15-23, page 449 of the A.M.A., *Guides*. The DMA specifically noted that the EMG/NCV studies did not yield findings sufficient to meet the criteria set forth in the A.M.A., *Guides* at Appendix 15-B on page 445 for rating an impairment due to entrapment/compression neuropathy. He noted that if a nerve conduction test is not performed or does not meet the diagnostic criteria there is no ratable impairment from this section. The DMA utilized Table 15-3 (Wrist Regional Grid), page 395, and noted the CDX for nonspecific wrist pain was a Class 1 impairment. He assigned a GMFH of 1, and noted that a GMPE and GMCS were not applicable. The DMA applied the net adjusted formula, which resulted in 0 percent permanent impairment of the right upper extremity.

The Board finds that OWCP properly found that the February 1, 2022 opinion by the DMA, Dr. Slutsky, constituted the weight of the medical evidence.[18] The DMA properly applied the appropriate tables and grading schemes of the A.M.A., *Guides* based on Dr. Johnson's clinical and physical examination findings. There is no probative medical evidence of record demonstrating

[16] *Id*.

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017).

[18] *K.J.*, Docket No. 19-0901 (issued December 6, 2019).

impairment. As such, appellant has not established permanent impairment of a scheduled member or function of the body, warranting a schedule award.[19]

As the medical evidence of record is insufficient to establish permanent impairment of a scheduled member or function of the body causally related to the accepted employment injury, the Board finds that appellant has not met her burden of proof.

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 permanent 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 August 31, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 18, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[19] *Id*.