United States Department of Labor
Employees' Compensation Appeals Board

MARY S. BROWN-BROOKS, Appellant	)	
and	)	**Docket No. 05-1744**
	)	**Issued: April 3, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	

Appearances:
Mary S. Brown-Brooks, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 19, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 26, 2004 merit decision concerning her entitlement to schedule award compensation and a July 13, 2005 decision, denying her request for further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she has an impairment which would entitle her to schedule award compensation; and (2) whether the Office properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 20, 2002 appellant, then a 38-year-old mail carrier, filed a claim alleging that she sustained injury to her right hand and wrist due to the duties of her job which included repetitive

lifting of heavy mail trays and pushing of heavy mail carts.[1] She did not stop work but continued to work in a limited-duty position. The Office accepted that appellant sustained employment-related right wrist tendinitis and paid compensation for periods of disability. She claimed entitlement to a schedule award due to the employment-related condition of her right hand and wrist.

Appellant received treatment for her right upper extremity condition from several attending physicians, including Dr. William H. Bowers, a Board-certified orthopedic surgeon, Dr. Stacey L. Epps, a Board-certified neurologist, and Dr. Anna K. Bittner, a Board-certified family practitioner. They diagnosed either tendinitis, tenosynovitis, radial sensory neuritis or de Quervain's syndrome of her right wrist and recommended various work restrictions.[2] Appellant participated in physical therapy sessions on a periodic basis.[3]

In a report dated April 4, 2003, Dr. Bittner noted that appellant had a 14 percent impairment for limited motion of the right wrist which was comprised of a 3 percent impairment due to 45 degrees of right wrist extension, a 7 percent impairment due to 20 degrees of flexion, a 2 percent impairment due to 20 degrees of ulnar deviation and a 2 percent impairment due to 15 degrees of radial deviation. She indicated that she had reached maximum medical improvement and stated:

> "[Appellant] also has marked decrease in grip strength with her best grip without pain at 2.5 [kilograms], with pain 5 [kilograms]. Either of these results in 30 percent disability for upper extremity. According to combination table in the [American Medical Association], *Guides to [the] Evaluation of Permanent Impairment*, this gives [appellant] a total disability of upper extremity 40 percent, which equals to 24 percent for whole person."

The results of an August 21, 2003 electromyogram (EMG) and nerve conduction testing of both upper extremities revealed normal motor nerve conductions of the median and ulnar nerves. A magnetic resonance imaging (MRI) scan obtained on the same date showed increased fluid in the right distal radial joint, without a tear of the triangular fibrocartilage and a suspected partial tear of the dorsal lunate insertion of the right scapholunate ligament.

[1] The Office previously accepted that appellant sustained right radial tenosynovitis after a box fell on her right hand and wrist at work on April 4, 2001. In her July 20, 2002 claim, appellant alleged that her current condition constituted a recurrence of her April 4, 2001 employment injury. However, appellant also explained that her work duties over a period of time were responsible for her claimed condition. Therefore, the Office properly treated her claim as a claim for a new occupational injury due to her job duties over a period of time. In connection with her July 20, 2002 claim, appellant indicated that she felt a pop in her right wrist after pushing a heavy mail cart on August 28, 2001, but it does not appear that the Office accepted that this incident caused a separate traumatic injury.

[2] Dr. Brower and Dr. Bittner noted such findings as pain, swelling and weakness of the right wrist. In a July 22, 2003 report, Dr. Bowers stated that appellant had limited motion of her right wrist.

[3] During some of the sessions, appellant exhibited limited motion of the right wrist.

The Office requested that an Office medical adviser review the case record and provide an opinion regarding the extent of any impairment to appellant's right upper extremity. In a report dated July 16, 2004, the Office medical adviser stated:

> "Please note I have reviewed the medical records to include narrative reports from several treating physicians to include Dr. Epps, Dr. Bowers and Dr. Bittner. There is absolutely no basis in the medical records for a rating of impairment to this individual's upper extremity or to the right wrist. Tenosynovitis in and of itself is not a basis for a rating of impairment based on the fifth edition of the [A.M.A., *Guides*]. I do not see any information which relates to any loss of motion at the wrist. There is no evidence of a carpal tunnel syndrome or any nerve entrapment and there is no specific diagnosis-related impairment which would warrant rating based on the fifth edition of the [A.M.A., *Guides*]. The impairment rating to the right wrist is zero percent."

The Office determined that there was a conflict in the medical evidence regarding appellant's impairment and referred her and the case record to Dr. William K. Fleming, a Board-certified orthopedic surgeon, for an impartial medical evaluation and opinion on this matter.

In a report dated September 28, 2004, Dr. Fleming determined that appellant did not have any permanent impairment of her right upper extremity. He indicated that diagnostic testing of her right upper extremity showed normal results, except for MRI scan which revealed a suspected partial tear of the dorsal lunate insertion of the right scapholunate ligament. Regarding the physical examination, Dr. Fleming stated:

> "[Appellant] guards against any motion of the wrist. There is no swelling present. She has a negative Finkelstein test today. No masses are felt about the snuffbox or the dorsum of the wrist. There are no masses on the palmar surface of the wrist or the hand itself. As far as I can tell, [range of motion] of the [metacarpophalangeal] and [interphalangeal] joints of the fingers are normal. It is difficult, as I [do not] feel the patient is cooperating fully, to examine her.
>
> "[Appellant] has a negative Tinel's at the wrist, but she complains of pain, even to light touch, with hammer to the wrist. I really could [not] perform a full Phalen's test, however, her EMG and [nerve conduction volecity] testing are negative."

Dr. Fleming diagnosed "no disease found of the right hand, secondary to contusion" and "chronic right hand pain." He stated, "After consulting the [fifth edition of the A.M.A., *Guides*], I could find no ratable condition as relates to chronic hand pain without documentable nerve, bony or soft tissue injury."

By decision dated November 26, 2004, the Office denied appellant's claim on the grounds that the medical evidence did not show that she has an impairment which would entitle her to a schedule award. The Office relied on the opinion of the impartial medical specialist, Dr. Fleming.

Appellant submitted additional evidence, including reports of Dr. Bowers dated between December 2004 and June 2005 and the report of a functional capacity evaluation obtained by a certified disability examiner on April 18, 2005.

By decision dated July 13, 2005, the Office denied appellant's request for a merit review.[4]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of her claim, including that he 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.[6]

The schedule award provision of the Act[7] and its implementing regulation[8] sets 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, the Act 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 regulation as the appropriate standard for evaluating schedule losses.[9]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[11] In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a

[4] Appellant submitted additional evidence after the Office's July 13, 2005 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[5] 5 U.S.C. §§ 8101-8193.

[6] *See Bobbie F. Cowart*, 55 ECAB ___ (Docket No. 04-1416 issued September 30, 2004).

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*.

[10] 5 U.S.C. § 8123(a).

[11] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

supplemental report from the specialist for the purpose of correcting the defect in the original opinion.[12]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained employment-related right wrist tendinitis due to the repetitive duties of her position and she claimed entitlement to a schedule award due to the employment-related condition of her right hand and wrist. Based on the opinion of Dr. Fleming, a Board-certified orthopedic surgeon, who served as an impartial medical specialist, the Office determined that she did not have an impairment which would entitle her to a schedule award.

The Board notes that the Office properly determined that there was a conflict in the medical evidence regarding appellant's entitlement to schedule award compensation and referred her and the case record to Dr. Fleming for an impartial medical evaluation and opinion on this matter.[13] In a report dated April 4, 2003, Dr. Bittner, an attending Board-certified family practitioner, determined that she had a 40 percent impairment of her right upper extremity due to limited motion of her right wrist and weakness of her right hand. In contrast, the Office medical adviser determined that appellant did not have any impairment of her right upper extremity.

In a September 28, 2004 report, Dr. Fleming stated that appellant did not have any impairment of her right upper extremity under the standards of the A.M.A., *Guides*. He reported the findings of examination of her right upper extremity, including the lack of swelling and masses and negative Finkelstein's and Tinel's tests. Dr. Fleming indicated that the motions of the right metacarpophalangeal and interphalangeal finger joints were normal, but he did not provide a clear opinion that he conducted the appropriate testing for upper extremity range of motion under the relevant standards of the A.M.A., *Guides*.[14] In particular, the earlier medical evidence suggested that appellant had some limitation of right wrist motion, but it is not clear whether he conducted range of motion testing for flexion, extension, ulnar deviation and radial deviation of the right wrist in the manner directed by the A.M.A., *Guides*.[15] The medical record also contained suggestions that she had pain and weakness in the right wrist and hand, but is unclear whether Dr. Fleming evaluated these matters under the relevant testing regimens and standards of the A.M.A., *Guides*.[16]

For these reasons, the opinion of Dr. Fleming is in need of clarification and elaboration. In order to resolve the conflict in the medical opinion, the case will be remanded to the Office for

[12] *Nancy Lackner (Jack D. Lackner),* 40 ECAB 232, 238 (1988).

[13] *See supra* notes 10 and 11 and accompanying text.

[14] *See generally* A.M.A., *Guides* 450-70.

[15] *Id.* at 466-70, Figures 16-26 to 16-31. Dr. Fleming suggested that appellant did not cooperate with range of motion testing, but he did not fully explain this comment. He did not provide measurements for any particular upper extremity motions.

[16] *See* A.M.A., *Guides* 480-511.

referral of the case record, a statement of accepted facts and, if necessary, appellant, to Dr. Fleming for a supplemental report regarding whether she has permanent impairment which would entitle her to schedule award compensation.[17] If Dr. Fleming is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office should submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on this issue.[18] After such further development as the Office deems necessary, an appropriate decision should be issued regarding whether appellant is entitled to schedule award compensation.

CONCLUSION

The Board finds that, due to a conflict in the medical evidence, the case is not in posture for decision regarding whether appellant has permanent impairment which would entitle her to schedule award compensation.[19]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 26, 2004 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: April 3, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[17] *See supra* note 12 and accompanying text.

[18] *Harold Travis*, 30 ECAB 1071, 1078 (1979).

[19] Due to the Board's disposition of the merit issue of the present case, it is not necessary to consider the nonmerit issue, *i.e.*, whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).