United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 08-591**
	)	**Issued: July 14, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Tuscaloosa, AL, 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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 16, 2008 appellant filed a timely appeal from an October 4, 2007 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for reconsideration, and an August 21, 2007 decision that denied his claim for an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues.

ISSUES

The issues are: (1) whether appellant has more than seven percent impairment of his left and right arms, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration without conducting a merit review.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated November 13, 2002, the Board affirmed the denial of appellant's hearing request but vacated the Office's October 2, 2001 decision, directing it to further develop the medical evidence regarding whether appellant's

carpal tunnel syndrome was employment related.[1] The Board's decision and the relevant facts contained therein are hereby incorporated by reference.

On January 8, 2003 the Office referred appellant to Dr. Robert Sparks, III, a Board-certified orthopedic surgeon, for a second opinion. In a January 29, 2003 report, Dr. Sparks found that appellant had fully recovered from his right carpal tunnel release that was performed in August 2001 but was likely to need the same procedure on the left side. He found that appellant's diagnosed bilateral carpal tunnel syndrome was directly related to his federal employment. On February 24, 2003 the Office accepted appellant's claim for bilateral carpal tunnel syndrome.

In a February 24, 2005 report, Dr. Timothy Bassett, a Board-certified orthopedic surgeon, noted appellant's complaints of continuing left hand pain. He indicated that appellant underwent a right carpal tunnel release in 2001 and had ongoing left carpal tunnel syndrome. Dr. Bassett recommended a left carpal tunnel release. On June 13, 2005 appellant stopped work and underwent a left carpal tunnel release surgery. He returned to full duty effective July 25, 2005. In an August 19, 2005 follow-up report, Dr. Bassett noted that appellant had recovered well from surgery and was expected to be able to use his left hand without difficulty.

On March 22, 2006 appellant claimed a schedule award. In a September 28, 2005 report, Dr. Bassett examined appellant's upper extremity range of motion and found 45 degrees of flexion, 60 degrees of extension, 12 degrees of ulnar deviation and 25 degrees of radial deviation for the right arm. He noted that appellant's reduced flexion corresponded to 2.5 percent impairment and his diminished ulnar deviation yielded 4 percent impairment, for a total of 6.5 percent, which he rounded up to 7 percent impairment of the right upper extremity. For the left arm, Dr. Bassett found 30 degrees of flexion, 60 degrees of extension, 20 degrees of ulnar deviation and 22 degrees of radial deviation. He explained that appellant's diminished flexion yielded five percent impairment and his reduced ulnar deviation warranted a finding of two percent impairment, for a total of seven percent impairment of the left upper extremity. Dr. Bassett stated that his findings were based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. On June 21, 2006 the Office medical adviser concurred with Dr. Bassett's impairment rating and noted that appellant reached maximum medical improvement on September 28, 2005.

By decision dated June 29, 2006, the Office granted appellant schedule awards for seven percent impairment to both the right and left upper extremities.

On October 11, 2006 appellant claimed an additional schedule award. In a November 28, 2006 report, Dr. Alexandre Todorov, a treating Board-certified psychiatrist and neurologist, noted that appellant had continuing bilateral carpal tunnel syndrome involving both sensory and motor components. On December 12, 2006 he stated that appellant's recovery would be a slow process. In a February 27, 2007 report, Dr. Todorov stated that appellant had severe atrophy of the thenar muscles in the left thumb, diminished strength, and diminished sensation in the fingers of both hands. He also noted results of nerve conduction studies from 2005 and 2006. In an accompanying impairment rating, Dr. Todorov determined that appellant had 13 percent left

[1] Docket No. 02-1477 (issued November 13, 2002).

upper extremity impairment and 13 percent right upper extremity impairment. He based his calculations on Table 16-10, measuring upper extremity impairments due to sensory deficit or pain from peripheral nerve disorders, Table 16-11, measuring motor deficit from peripheral nerve disorders, and Table 16-15, measuring maximum upper extremity impairment due to unilateral sensory or motor deficits or combined 100 percent deficits of major peripheral nerves. Dr. Todorov found that appellant had 12.5 percent impairment of each upper extremity based on sensory deficit and 1 percent impairment of each upper extremity based on motor deficit. He also stated that appellant had five percent impairment for cervical radiculopathy at the C5 level based on Table 15-17 at page 424 of the A.M.A., *Guides*. Dr. Todorov combined his impairment ratings to find that appellant had a total of 31 percent impairment of the bilateral upper extremities.

In an April 18, 2007 report, the Office medical adviser noted that appellant's cervical radiculopathy had not been accepted as work related. Therefore, Dr. Todorov's impairment rating was invalid to the extent that it considered the cervical radiculopathy. He noted that appellant had previously received a schedule award for seven percent impairment of each upper extremity. Explaining that current impairment ratings must be based on the fifth edition of the A.M.A., *Guides*, page 495, the medical adviser concluded that Dr. Todorov's recommended impairment rating of 13 percent for each upper extremity did not comport with the A.M.A., *Guides*. He concluded that the medical evidence did not establish that appellant was entitled to an additional schedule award.

In a June 20, 2007 report, Dr. Alexander Smirnoff, a Board-certified psychiatrist and neurologist to whom appellant was referred by Dr. Bassett, noted the results of motor and sensory nerve conduction studies. He diagnosed severe focal median mononeuropathy of the left wrist, or entrapment of the carpal tunnel, as well as reduced amplitudes in the left sensory ulnar nerve. In a July 23, 2007 report, the Office medical adviser noted Dr. Smirnoff's June 20, 2007 electrodiagnostic studies and noted that the finding of left median nerve compression had previously been documented in the medical evidence. He stated that the finding had not changed from prior medical reports and the new studies did not establish increased impairment.

On August 7, 2007 Dr. Bassett stated that appellant had ongoing carpal tunnel syndrome, which had improved marginally since 2005. He explained that appellant's work was aggravating his condition.

By decision dated August 21, 2007, the Office denied an additional schedule award.

On September 18, 2007 appellant requested reconsideration. In support of his request, he provided a September 6, 2007 follow-up report from Dr. Todorov, who noted that appellant's continuing carpal tunnel symptoms included weak grip, the beginnings of left bicep numbness, stiffness in the hands, and severe pain in the hands, wrists and elbows, particularly at night. Dr. Todorov noted that the Office had denied appellant's claim for an additional schedule award, maintaining his impairment rating at seven percent of each upper extremity. Appellant also provided a nerve conduction study from Dr. Todorov, noting his complaints of neck pain radiating into the bilateral upper extremities.

By decision dated October 4, 2007, the Office denied appellant's request for reconsideration without conducting a merit review, on the grounds that appellant had not asserted that the Office misapplied or misinterpreted a point of fact or law, presented new and relevant legal contentions, or submitted new and relevant medical evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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, 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.[4]

Section 8123(a) of the Act provides that, 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.[5] When the case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence, the opinion of such specialist will be given special weight when based on a proper factual and medical background and sufficiently well rationalized on the issue presented.[6]

ANALYSIS -- ISSUE 1

The Board finds that there is a conflict in the medical evidence between Dr. Todorov and the Office medical adviser.

On February 27, 2007 Dr. Todorov found that appellant had 13 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity due to residual sensory and motor deficit due to his accepted carpal tunnel syndrome. The A.M.A., *Guides*, page 495, in discussing impairment based on carpal tunnel syndrome, states that, in the event of positive clinical findings of median nerve dysfunction and electrical conduction delays, a physician may rate impairment according to the methods outlined in the A.M.A., *Guides* for rating sensory or motor deficits. Dr. Smirnoff's June 20, 2007 electrodiagnostic study and the reports of Dr. Todorov note positive clinical findings. Dr. Todorov applied Tables 16-10, 16-11 and 16-15 in rating sensory and motor deficits. Accordingly, his impairment rating is properly

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *See id.*

[5] 5 U.S.C. § 8123(a); *see Elsie L. Price*, 54 ECAB 734 (2003); *Raymond J. Brown*, 52 ECAB 192 (2001).

[6] *See Bernadine P. Taylor*, 54 ECAB 342 (2003); *Anna M. Delaney*, 53 ECAB 384 (2002).

based on the A.M.A., *Guides* in finding 12.5 percent impairment of the arms due to sensory and motor deficits under Chapter 16 of the A.M.A., *Guides*.[7]

The Office medical adviser concluded that Dr. Todorov's impairment rating did not comport with the A.M.A., *Guides* because he also recommended five percent upper extremity impairment due to C5 radiculopathy. He found that no additional impairment was warranted under the A.M.A., *Guides*.

The Board finds that the reports of the Office medical adviser and Dr. Todorov are of approximately equal weight and rationale and created a conflict in the medical evidence. On remand, the Office should refer appellant to an appropriate Board-certified specialist for an impartial medical examination to determine the extent of his permanent impairment of each arm pursuant to the A.M.A., *Guides*.[8] Following this and such other development as deemed necessary, the Office shall issue a *de novo* decision.[9]

CONCLUSION

The Board finds that the case is not in posture for decision because there is an unresolved conflict in the medical evidence concerning the degree of impairment to appellant's upper extremities.

[7] The Board notes, however, that Dr. Todorov did not fully explain how he calculated impairment for the left arm due to C5 radiculopathy pursuant to the A.M.A., *Guides*.

[8] *See Thomas J. Fragale*, 55 ECAB 619 (2004).

[9] In view of the Board's disposition of the first issue, it is not necessary for the Board to address the second issue.

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2007 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision.

Issued: July 14, 2008
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