United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
	)	
and	)	**Docket No. 10-2181**
	)	**Issued: June 20, 2011**
U.S. POSTAL SERVICE, NEW JERSEY INTERNATIONAL & BULK MAIL CENTER, Newark, NJ, Employer	)	

Appearances:
James Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from a July 12, 2010 decision of the Office of Workers' Compensation Programs regarding a schedule award. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained more than a one percent permanent impairment of the right upper extremity and a one percent impairment of the left upper extremity, for which he received a schedule award.

On appeal, counsel contends that the Office delayed developing the medical evidence until the sixth edition of the American Medical Association, *Guides to the Evaluation of*

[1] 5 U.S.C. § 8101 *et seq.*

Permanent Impairment (A.M.A., *Guides*) (hereinafter) went into effect to avoid awarding a higher percentage of permanent impairment under the fifth edition of the A.M.A., *Guides*.

FACTUAL HISTORY

The Office accepted that on or before September 1, 2006 appellant, then a 69-year-old retired custodian,[2] sustained bilateral carpal tunnel syndrome due to repetitive lifting and pushing in the performance of duty.

In a November 29, 2006 report, Dr. Mark A. Filippone, an attending Board-certified physiatrist, related appellant's symptoms of bilateral hand pain and paresthesias. On examination he found a positive Phalen's sign on the right and a bilaterally positive Tinel's sign at the median nerve of both wrists. Dr. Filippone observed diminished pinprick sensation in the right hand and forearm and in the left thumb, index and middle fingers. He diagnosed bilateral carpal tunnel syndrome. Dr. Filippone submitted progress reports through February 2008 noting positive Tinel's and Phalen's signs bilaterally. Periodic electromyography (EMG) and nerve conduction velocity (NCV) studies showed bilateral median nerve conduction abnormalities and bilateral C5-6 radiculopathy.

In an October 30, 2007 report, Dr. Teofilo A. Dauhajre, an attending Board-certified orthopedic surgeon, noted bilaterally negative Tinel's and Phalen's signs and full range of wrist motion. He diagnosed bilateral carpal tunnel syndrome and "double crush syndrome" of the upper extremities.

On August 9, 2008 appellant claimed a schedule award. He submitted a May 27, 2008 report from Dr. David Weiss, an attending osteopathic physician. On examination of the upper extremities, Dr. Weiss noted positive Tinel's, Phalen's and carpal compression signs bilaterally, diminished light touch sensation in the median nerve distribution of both hands, two-point discrimination at 16 millimeter (mm) on the right and 10 mm on the left in the median nerve distribution and pinch key strength at 5 kilogram on the left. He found that appellant attained maximum medical improvement as of that day. Referring to Table 16-10, page 482 and Table 16-15, page 492 of the fifth edition of the A.M.A., *Guides*,[3] Dr. Weiss found a 31 percent impairment of each upper extremity due to Grade 2 sensory deficit in the median nerve. He also found a 20 percent impairment of the left upper extremity due to lateral pinch strength deficit according to Table 16-34, page 509 of the A.M.A., *Guides*.[4] Dr. Weiss combined the 31 and 20 percent impairments of the left upper extremity to total 45 percent

[2] Appellant retired from the employing establishment on April 1, 2006.

[3] Table 16-10, page 482 of the fifth edition of the A.M.A., *Guides* is entitled "Determining Impairment of the Upper Extremity Due to Sensory Deficits or Pain Resulting From Peripheral Nerve Disorders." Table 16-15, page 492 of the fifth edition of the A.M.A., *Guides* is entitled "Maximum Upper Extremity Impairment Due to Unilateral Sensory or Motor Deficits or to *Combined* 100% Deficits of the Major Peripheral Nerves."

[4] Table 16-34, page 509 of the fifth edition of the A.M.A., *Guides* is entitled "Upper Extremity Joint Impairment Due to Loss of Grip or Pinch Strength."

In an October 1, 2008 memorandum, an Office medical adviser recommended a second opinion examination to clarify the divergent clinical findings noted by Dr. Dauhajre and Dr. Weiss.[5] On December 23, 2008 the Office referred appellant, the medical record and a statement of accepted facts to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a schedule award evaluation. A copy of the medical record and a statement of accepted facts were provided for the physician's review.

In a January 20, 2009 report, Dr. Rubinfeld provided a history of injury and treatment and reviewed the statement of accepted facts. On examination, he observed full ranges of motion of both shoulders, elbows and wrists, bilaterally negative Tinel's and Phalen's signs, no thenar atrophy, 5/5 motor strength throughout both upper extremities and diminished sensation in all fingers of both hands. Dr. Rubinfeld diagnosed "[p]ossible bilateral carpal tunnel syndrome." He assessed a 29 percent impairment of each upper extremity due to sensory loss according to Table 16-10, page 482 of the fifth edition of the A.M.A., *Guides*.

In an April 4, 2009 report, an Office medical adviser noted that he could not calculate a schedule award as Dr. Rubinfeld did not quantify the sensory deficit he observed in appellant's fingers. On May 19, 2009 the Office requested that Dr. Rubinfeld submit a supplemental report calculating an impairment rating according to the sixth edition of the A.M.A., *Guides*. It authorized Dr. Rubinfeld to perform a second clinical examination.

In a July 18, 2009 report, Dr. Rubinfeld noted findings of a July 16, 2009 examination. He noted a "distal palmar scar" on each hand. Dr. Rubinfeld found full ranges of motion, normal strength, sensation and reflexes throughout the upper extremities, negative Tinel's and Phalen's signs at both wrists and no atrophy in either hand. He obtained grip and pinch strength measurements with an unspecified dynamometer. Dr. Rubinfeld diagnosed "[p]ossible bilateral carpal tunnel syndrome." He found that the negative clinical findings were inconsistent with a diagnosis of carpal tunnel syndrome. Referring to Table 15-31, page 480 of the sixth edition of the A.M.A., *Guides*, Dr. Rubinfeld found a three percent permanent impairment of each upper extremity.[6]

In an October 31, 2009 memorandum, an Office medical adviser noted that he could not verify Dr. Rubinfeld's July 19, 2009 impairment rating as he did not explain how he utilized Table 15-31, page 580 of the A.M.A., *Guides*. Dr. Rubinfeld submitted a January 13, 2010 supplemental report stating that "[o]ther than a prior EMG/NCV study, there were no findings supportive of the diagnosis of carpal tunnel syndrome of either wrist." Referring to paragraph

[5] On November 12, 2008 the Office referred appellant to Dr. Andrew N. Hutter, a Board-certified orthopedic surgeon, for a schedule award evaluation. Dr. Hutter submitted a November 25, 2008 report noting weak grip strength in both hands, diminished sensation in the second, third and fourth fingers of each hand and a positive Tinel's sign on the right. He did not refer to the A.M.A., *Guides* in his report. In a December 17, 2008 e-mail, the Office noted that Dr. Hutter did not use "proper equipment to measure grip strength" and did not refer to the A.M.A., *Guides*. As Dr. Hutter was unable to clarify his opinion, the Office scheduled appellant for a new second opinion examination.

[6] Table 15-31, page 480 of the sixth edition of the A.M.A., *Guides* is entitled "Upper Extremity Evaluation Example."

four on page 479 of the sixth edition of the A.M.A., *Guides*, Dr. Rubinfeld revised his rating to one percent of each upper extremity.

In a May 9, 2010 report, the Office medical adviser concurred with Dr. Rubinfeld's assessment of a one percent impairment of each upper extremity as the EMG and NCV studies were "essentially negative."

By decision dated July 12, 2010, the Office granted appellant a schedule award for a one percent impairment of each upper extremity. The award, equivalent to 6.24 weeks of compensation, ran from July 19 to August 31, 2009. The Office noted that Dr. Rubinfeld examined appellant on January 20, 2009, prior to May 1, 2009 effective date of the sixth edition of the A.M.A., *Guides*, but held that Dr. Rubinfeld's opinion could not be fully clarified until January 2010.

LEGAL PRECEDENT

The schedule award provisions of the Act[7] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[10] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - DCX) + (GMCS - CDX).

[7] 5 U.S.C. §§ 8101-8193.

[8] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* (6th ed. 2008), page 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[11] *Id*. at (6th ed. 2008), pp. 494-531.

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome on or before September 1, 2006. Appellant claimed a schedule award on August 9, 2008. Dr. Weiss, an attending osteopath, diagnosed carpal tunnel syndrome in May 2008, based on bilaterally positive Tinel's and Phalen's signs and sensory deficits in both hands. In contrast, Dr. Dauhajre, an attending Board-certified orthopedic surgeon, found negative Tinel's and Phalen's signs bilaterally in October 2007. He diagnosed carpal tunnel and "double crush" syndromes. To clarify the inconsistencies among appellant's physicians, the Office referred appellant to Dr. Rubinfeld, a Board-certified orthopedic surgeon, to obtain a schedule award evaluation.

Dr. Rubinfeld first submitted a January 20, 2009 report finding a 29 percent impairment of each upper extremity due to sensory loss. However, because he did not properly correlate his findings to the fifth edition of the A.M.A., *Guides*, the Office authorized a follow-up examination on July 16, 2009. In a July 18, 2009 report, Dr. Rubinfeld noted a "distal palmar scar" on each hand. There is no indication of record that appellant underwent median nerve release or other surgery on his hands or wrists. The statement of accepted facts provided to Dr. Rubinfeld does not note such surgery, nor do appellant's attending physicians describe palmar scars from any cause. Also, Dr. Rubinfeld assessed a three percent impairment of each upper extremity according to Table 15-31, page 480 of the sixth edition of the A.M.A., *Guides*, in effect as of May 1, 2009. However, as an Office medical adviser noted on October 31, 2009, Table 15-31, entitled "Upper Extremity Impairment Evaluation Example," was a sample evaluation irrelevant to appellant's case. This error necessitated Dr. Rubinfeld submitting a January 13, 2010 supplemental report, in which he found a one percent impairment of each upper extremity according to paragraph four on page 479 of the sixth edition of the A.M.A., *Guides*.

The Office issued the July 12, 2010 schedule award based on Dr. Rubinfeld's January 13, 2010 opinion. However, the fourth paragraph on page 479 of the A.M.A., *Guides* discusses the grading method for lateral epicondylitis. Dr. Rubinfeld did not explain why he changed his diagnosis from carpal tunnel syndrome to lateral epicondylitis, a condition heretofore unmentioned in the medical record. Also, he did not set forth how he used the grading method in the fourth paragraph on page 479 to calculate a one percent impairment of each upper extremity. The Board finds that Dr. Rubinfeld did not properly utilize the A.M.A., *Guides*. Therefore, the Office erred by basing the July 12, 2010 schedule award on his opinion.[12] The case will be returned to the Office for appropriate development to determine the percentage of any permanent impairment to the upper extremities caused by the accepted bilateral carpal tunnel syndrome. Following such development, the Office will issue a *de novo* decision in the case.

On appeal, counsel contends that the Office delayed developing the medical evidence in order to award a lower percentage of impairment under the sixth edition of the A.M.A., *Guides*. As set forth above, Dr. Rubinfeld's opinion required clarification, extending the period of development of the schedule award claim. However, it does not appear from the record that the Office deliberately delayed development to lower the amount of the schedule award.

[12] *D.N.*, 59 ECAB 577 (2008).

In *Harry D. Butler*,[13] the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[14] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office should reflect use of the sixth edition of the A.M.A., *Guides*.[15] The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.

CONCLUSION

The Board finds that the case is not in posture for decision. The case will be remanded to the Office for appropriate further development to determine the percentage of permanent upper extremity impairment due to accepted bilateral carpal tunnel syndrome.

[13] 43 ECAB 859 (1992).

[14] *Id.* at 866.

[15] FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, *supra* note 3, Chapter 2.808.6(a) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 12, 2010 is set aside and the case remanded to the Office for further development consistent with this decision and order.

Issued: June 20, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board