United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 12-649**
	)	**Issued: February 14, 2013**
U.S. POSTAL SERVICE, POST OFFICE Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2012 appellant, through her attorney, filed a timely appeal of an August 31, 2011 schedule award decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has more than one percent impairment of her right upper extremity for which she received a schedule award.

On appeal, counsel argued that OWCP engaged in doctor shopping, that the impartial medical examiner was not properly selected and that his medical report was not entitled to special weight.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 15, 1989 appellant, then a 48-year-old clerk, filed a traumatic injury claim alleging that she sprained her right wrist while lifting a full letter tray. OWCP authorized surgical decompression of the right thumb extensor tendon on November 2, 1989. On January 19, 1990 appellant underwent a surgical decompression of the first dorsal extensor compartment due to de Quervain's disease of the right wrist. OWCP accepted her claim for de Quervain's right wrist on June 4, 1990.

Appellant's attending physician diagnosed bilateral carpal tunnel syndrome beginning on May 3, 1990. On May 3, 1993 she underwent electromyogram (EMG) testing which demonstrated grade 1 right carpal tunnel syndrome and grade 2 left carpal tunnel syndrome. On April 24, 1995 appellant underwent a right carpal tunnel release. She underwent left carpal tunnel release in June 30, 1995.

Appellant underwent a second EMG and nerve conduction study on December 1, 1995. These tests demonstrated bilateral median neuropathy at the wrists worse on the left with ulnar neuropathy right elbow, left wrist and severe bilateral brachial plexopathy. OWCP accepted sprain of the right wrist, de Quervain's disease and bilateral carpal tunnel syndrome.

Dr. Neil R. Schultz, Board-certified in physical medicine and rehabilitation, was designated an impartial medical examiner to determine whether appellant had any residuals due to her accepted employment injury. In an April 19, 2004 report, he opined that she had no work-related disabling residuals. Dr. Schultz noted that appellant had objective physical findings including positive Tinel's signs in both wrists, right greater than the left, positive Phalen's test in both wrists as well as positive Roos' tests bilaterally right greater than left. He found mild grip strength weakness on the right.

By decision dated June 7, 2004, OWCP terminated appellant's entitlement to compensation and medical benefits effective April 15, 1989. The Branch of Hearings and Review affirmed the June 7, 2004 decision on June 3, 2005.

Appellant filed a claim for a schedule award on January 31, 2008. Dr. David Weiss, an osteopath, completed a report on October 22, 2007. He found that appellant had 50 percent impairment to each upper extremity due to pinch deficit, motor strength deficit and sensory deficit of the median nerves bilaterally under the fifth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Weiss opined that appellant reached maximum medical improvement on October 22, 2007. He reported loss of muscle mass involving the thenar eminence of the left hand, positive Tinel's sign and positive Phalen's test. Dr. Weiss found loss of thumb strength. He reported similar findings on the right with the addition of tenderness over the abductor pollicis longus and extensor pollicis brevis with a positive Finkelstein's test. On July 28, 2008 OWCP's medical adviser found that Dr. Weiss' report did not properly apply the fifth edition of the A.M.A., *Guides.*[2] He recommended a second opinion evaluation.

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[2] A.M.A., *Guides*, 5th ed. (2001).

OWCP determined that there was a conflict between Dr. Shultz and Dr. Weiss regarding appellant's permanent impairment. It referred appellant for an impartial medical examination to Dr. Pedro Monserrate, a Board-certified orthopedic surgeon, on February 12, 2009.

In a report dated March 16, 2009, Dr. Monserrate reviewed the medical reports and performed a physical examination finding that appellant had a positive Phalen's test on the right with a positive Tinel's sign. He noted that she demonstrated hypoesthesia and moderate weakness with right thumb abduction. Dr. Monserrate found that appellant had normal two-point discrimination. He found that her left hand had adequate two-point discrimination. Dr. Monserrate diagnosed carpal tunnel syndrome bilaterally and found moderate impairment of the upper extremities due to entrapment syndrome of the median nerve at the wrist or 25 percent impairment of each upper extremity. He rated impairment using the Florida Impairment Guide of 1996 in conjunction with the fifth edition of the A.M.A., *Guides.* Dr. Monserrate found grade 2 impairment due to combined sensory and motor deficits or 34 percent of the right upper extremity and 40 percent of the left upper extremity. He concluded that appellant had 43 percent impairment of the upper extremities. Dr. Monserrate noted that her de Quervain's symptomology and objective findings had resolved and that she had no impairment due to this condition.

OWCP's medical adviser reviewed Dr. Monserrate's report and found that he did not properly apply the A.M.A., *Guides*.

On July 17, 2009 OWCP referred appellant for a second impartial medical examination to Dr. David Heligman, a Board-certified orthopedic surgeon, who completed a report on September 23, 2009 reviewed appellant's history of injury and medical history. Dr. Heligman reported right shoulder flexion and abduction of 145 degrees, with a mildly positive impingement sign. Appellant also demonstrated a mildly positive Tinel's sign in the right elbow over the cubital tunnel. In the right hand, she had a mildly positive Tinel's sign over the volar aspect of the wrist and weakness with thumb pinch with no evidence of muscle atrophy. Dr. Heligman found a positive Phalen's sign and mildly positive Tinel's test bilaterally. In a report dated October 13, 2009, he rated appellant's permanent impairment based on the Florida Uniform Permanent Impairment Rating Schedule.

In a February 3, 2010 memorandum to the file, OWCP noted that neither Dr. Monserrate nor Dr. Heligman used the appropriate version of the A.M.A., *Guides*.

On March 2010 it referred appellant to Dr. William Bennett, a Board-certified orthopedic surgeon, for an impartial medical examination. On April 7, 2010 Dr. Bennett found that appellant's wrist examination was normal. He opined that the tingling in her hands was related to ulnar nerve compression at the elbows bilaterally secondary to cervical spine degenerative conditions. Dr. Bennett found that appellant's right hand had normal two-point discrimination in the radial, median and ulnar distribution and that strength in the thenar eminence was normal. He applied the sixth edition of the A.M.A., *Guides* to find that she had one percent impairment of each upper extremity due to test 1, history 2, physical examination 1 and The Disabilities of the Arm, Shoulder and Hand (*Quick*DASH) score of 14. Dr. Bennett applied Table 15-23 of the A.M.A., *Guides* (6th ed.).

Dr. James W. Dyer, OWCP's medical adviser, reviewed the report of Dr. Bennett and found that he correctly applied the A.M.A., *Guides*. He agreed that appellant had one percent impairment to each arm.

By decision dated May 27, 2010, OWCP granted appellant schedule awards for one percent impairment of each of her upper extremities.

Counsel requested an oral hearing on June 2, 2010. On August 4, 2010 the Branch of Hearings and Review found that the case was not in posture for a decision as the case required clarification from Dr. Bennett regarding whether appellant's current conditions were due to her accepted employment injuries.

Dr. Weiss resubmitted his October 22, 2007 report on January 15, 2010 "updated" to comport to the sixth edition of the A.M.A., *Guides*. He evaluated appellant's de Quervain's tenosynovitis as a class 1, right wrist impairment.[3] Dr. Weiss found that her Functional History (GMFH) was grade 3 due to *Quick*DASH score of 61 percent.[4] He determined that appellant's Physical Examination (GMPE) was grade 2 due to observation and palpatory findings. Appellant's Clinical Studies (GMCS) score was 0. Dr. Weiss determined that appellant had a net adjustment of 2 for right upper extremity impairment of two percent.

Dr. Weiss evaluated appellant's entrapment neuropathy of the right and left median nerves at the wrist and found a test findings score of 1, functional history score of 3 and physical examination score of 3 due to thenar atrophy. He totaled these figures to reach seven and average of two or five percent impairment. Dr. Weiss increased this impairment rating due to the *Quick*DASH score of 61 percent to reach bilateral median nerve impairments of 6 percent which he combined on the right with the tenosynovitis impairment to reach an upper extremity impairment of 8 percent.[5]

In a letter dated November 30, 2010, OWCP requested a supplemental report from Dr. Bennett addressing whether appellant's conditions were related to her accepted employment injuries. On December 7, 2010 Dr. Bennett stated that appellant had minor residuals from the accepted injury which contributed to her current impairment. He stated that her current symptoms were due to cubital tunnel syndrome or ulnar nerve entrapment with degenerative disc disease.

OWCP issued a decision dated January 25, 2011 finding that appellant had no more than one percent impairment of each to her upper extremities for which she had received a schedule award.

Counsel requested an oral hearing before an OWCP hearing representative. At the oral hearing on May 26, 2011, appellant described her upper extremity surgeries.

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[3] *Id.* at 395, Table 15-3.

[4] *Id.* at 406, Table 15-7.

[5] *Id*.

By decision dated August 31, 2011, OWCP's hearing representative affirmed the January 25, 2011 decision with regards to appellant's right upper extremity. He remanded the case for additional development as to her left upper extremity due to appellant's congenital deformity of the left ring and little finger.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. FECA, 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 matter which rests in the discretion of OWCP. 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[8]

The sixth edition of the A.M.A., *Guides* provided a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Function, Disability and Health (ICF).[9] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX) which is then adjusted by grade modifies based on GMFH, GMPE and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[12] In Table 15-23, grade modifiers levels (ranging from 0 to 4) are described for the categories 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

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[6] 5 U.S.C. §§ 8101-8193, 8107.

[7] 20 C.F.R. § 10.404.

[8] For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); *id.* at Part 3 -- Medical, *Schedule Awards,* Chapter 3.700, Exhibit 1 (January 2010).

[9] A.M.A., *Guides*, 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[10] *Id*. at 385-419.

[11] *Id*. at 411.

[12] *Id*. at 449.

value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[13]

ANALYSIS

OWCP accepted that appellant developed carpal tunnel syndrome in her right upper extremity as a result of her accepted employment injury. Appellant filed a claim for a schedule award in 2008 and submitted medical evidence from Dr. Weiss. OWCP's medical adviser reviewed Dr. Weiss' report and found that it did not comport with the A.M.A., *Guides*.

The Board notes that OWCP then improperly determined that there was a conflict of medical opinion between Dr. Weiss and Dr. Schultz regarding the extent of permanent impairment a result of her accepted employment injury pursuant to 5 U.S.C. § 8123(a). In 2004, appellant was referred to Dr. Schultz on the issue of disability residuals of her accepted injury. Dr. Schultz found that she had no disabling residuals. He was not asked to address the issue of permanent impairment. In 2008, Dr. Weiss advised that appellant had reached maximum medical improvement. He rated impairment to her arms. The Board finds that there was no disagreement between these physicians as contemplated by 5 U.S.C. § 8123(a). Dr. Schultz did not address the issue of permanent impairment and his report was not relevant to this issue.

As there was no conflict of medical opinion evidence, the physicians selected by OWCP, including Dr. Monserrate, Dr. Heligman and Dr. Bennett, were not impartial medical specialists, but second opinion physicians.

The Board notes that neither Dr. Monserrate nor Dr.Heligman properly applied the A.M.A., *Guides* to rule appellant's permanent impairment. It is well established that, when a physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment.[14] Dr. Monserrate stated that he used both the fifth edition of the A.M.A., *Guides* as well as the Florida Impairment Guide of 1996 to determine his impairment rating. Dr. Heligman also applied the Florida Uniform Permanent Impairment Rating Schedule to determine appellant's impairment. As noted, OWCP used the A.M.A., *Guides* for determining permanent impairment. As neither Dr. Monserrate nor Dr. Heligman correctly applied the A.M.A., *Guides*, their reports are of diminished probative value in determining appellant's impairment.

Dr. Weiss determined on October 22, 2007 that appellant had 50 percent impairment of each upper extremity due to pinch deficit, motor strength deficit and sensory deficit of the median nerves bilaterally. He found that she reached maximum medical improvement on October 22, 2007. Dr. Weiss reported findings on the left including loss of muscle mass involving the thenar eminence of the left hand, positive Tinel's sign and positive Phalen's test as well as loss of thumb strength. He reported similar findings on the right with the additional of tenderness over the abductor pollicis longus and extensor pollicis brevis with a positive Finkelstein's test. Dr. Weiss provided his impairment rating in accordance with the fifth edition

[13] *Id*. at 448-50.

[14] *P.M.,* Docket No. 12-472 (issued December 27, 2012).

of the A.M.A., *Guides*. As noted above, this report is of limited probative value as it is not based on the proper edition of the A.M.A., *Guides*.

On January 15, 2010 Dr. Weiss "updated" his October 22, 2007 report, under the sixth edition of the A.M.A., *Guides*. He found a class 1 right wrist impairment due to de Quervain's tenosynovitis.[15] Dr. Weiss found that appellant's functional history was grade 3 due to *Quick*DASH score of 61 percent.[16] He further determined that her physical examination was grade 2 due to observation and palpatory findings.[17] Appellant's clinical studies score was 0.[18] Dr. Weiss determined that she had a net adjustment of 2 for right upper extremity impairment of two percent.

Dr. Weiss evaluated appellant's entrapment neuropathy of the right and left median nerves at the wrist[19] and found a test findings score of 1, history score of 3 and physical examination score of 3 due to thenar atrophy. He totaled these figures to reach seven and average of two or five percent impairment. Dr. Weiss increased this impairment rating due to the *Quick*DASH score of 61 percent to reach bilateral median nerve impairments of 6 percent which he combined on the right with the tenosynovitis impairment to reach an upper extremity impairment of 8 percent. The Board finds that this report is of reduced probative value as Dr. Weiss relied on physical findings some three years old to update impairment rating. Dr. Weiss did not base his rating on a correct physical examination.[20]

In a April 7, 2010 report, Dr. Bennett found that that appellant's wrist examination was normal. He attributed her hand symptoms to ulnar nerve compression at the elbows due to cervical spine degenerative conditions. Dr. Bennett found normal two-point discrimination, in the radial median and ulnar distribution and that strength in the thenar eminence was normal on the right. Applying the sixth edition of the A.M.A., *Guides,* he found that appellant had one percent impairment to each upper extremity due to test 1, history 2, physical examination 1 and a *Quick*DASH score of 14.[21] Dr. Bennett completed an addendum on December 7, 2010 and stated that she had minor residuals from the original injury which contributed to her current impairment. He reiterated that appellant's current symptoms were due to cubital tunnel syndrome or ulnar nerve entrapment with degenerative disc disease. OWCP's medical adviser reviewed Dr. Bennett's report and found it consistent with the A.M.A., *Guides*.

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[15] A.M.A., *Guides*, 395, Table 15-3.

[16] *Id*. at 406, Table 15-7.

[17] *Id*. at 408, Table 15-8.

[18] *Id*. at 410-11, Table 15-9.

[19] *Id*. at 449, Table 15-23

[20] *See H.C.*, Docket No. 11-1407 (issued May 11, 2012) (Finding that Dr. Weiss did not reexamine appellant and relied on a 2004 examination such that his report constituted stale medical evidence and did not create a conflict of medical opinion evidence).

[21] A.M.A., *Guides*, 445, 449 Table 15-23.

The Board finds that Dr. Bennett's report is entitled to the weight of the medical evidence. It establishes that appellant has no more than one percent impairment to each arm for which she has received schedule awards.

Appellant may request a schedule award or increased schedule award 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 no more than one percent impairment of her right upper extremity for which she has received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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