United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 16-1101**
	)	**Issued: November 4, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 3, 2016 appellant, through counsel, filed a timely appeal from a March 23, 2016 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.

ISSUE

The issue is whether appellant has more than two percent permanent impairment of each upper extremity, for which he received schedule awards.

[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.*

FACTUAL HISTORY

On November 13, 2014 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome due to factors of his federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome, tenosynovitis of the right hand and wrist, and synovitis and tenosynovitis of the left hand.

A September 10, 2014 electromyogram (EMG) and nerve conduction velocity (NCV) study revealed moderately severe bilateral carpal tunnel syndrome especially on the right side. An EMG study performed on October 22, 2014 revealed moderate bilateral carpal tunnel syndrome.

Appellant underwent a left carpal tunnel release and flexor tenosynovectomy on April 23, 2015 and a right carpal tunnel release and flexor tenosynovectomy on June 25, 2015. OWCP authorized the surgeries.

In an impairment evaluation dated December 17, 2015, Dr. Michael Platto, a Board-certified physiatrist, reviewed appellant's history of injury, the results of electrodiagnostic testing, and history of bilateral carpal tunnel releases. On examination he measured range of motion of the wrists and found decreased two-point discrimination of the left thumb, middle, and index fingers. Citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Platto found that appellant had three percent permanent impairment due to tenosynovitis as a result of bilateral loss of wrist range of motion according to Table 15-32 on page 473. In rating impairment due to carpal tunnel syndrome, he referenced Table 15-23 on page 449. Utilizing the preoperative EMG study dated September 10, 2014, for the right side Dr. Platto applied a grade modifier of three due to test findings of axon loss, a grade modifier of one for normal physical findings with intermittent symptoms, and a grade modifier of one for physical examination, which rounded to a grade modifier of two. He found a grade modifier of zero based on a *Quick*DASH (Disabilities of the Arm, Shoulder, and Hand) score of 15.9. For the left side, Dr. Platto advised that he performed NCV studies due to appellant's complaints of numbness not improved after surgery. He opined that the NCV studies revealed axon loss with "decreased motor median amplitude of less than [five]" and a delay in median sensory peak latency, which yielded a grade modifier of three for test results. Dr. Platto also applied a grade modifier of one for a history of mild intermittent symptoms and a grade modifier of two for physical findings of decreased two-point discrimination. He found an average grade modifier of two, or four percent impairment. Dr. Platto concluded that appellant had three percent impairment of each upper extremity due to tenosynovitis and four percent impairment of each upper extremity due to carpal tunnel syndrome, for a combined seven percent permanent impairment of each upper extremity. He opined that appellant had reached maximum medical improvement.

On January 8, 2016 appellant filed a claim for a schedule award (Form CA-7).

OWCP on January 20, 2016 referred appellant to Dr. Shaka Walker, a Board-certified orthopedic surgeon, for a second opinion examination. In an impairment evaluation dated February 1, 2016, Dr. Walker reviewed appellant's history of hand numbness and pain treated

with carpal tunnel releases and flexor tenosynovectomies. On examination, he found no atrophy and a negative Tinel's sign and Phalen's test. Dr. Walker measured range of motion of the wrists and performed pinch and grip strength testing. He opined that appellant had reached maximum medical improvement. Dr. Walker advised that he had normal range of motion findings for the wrists for a grade modifier of zero. He noted that appellant had a *Quick*DASH score of 47.7, which was a significant increase from the prior score of 15.9 and "concerning for some element of symptom magnification…." Dr. Walker concluded that he had no impairment due to tenosynovitis due to reduced motion. Using Table 15-23 on page 449 of the A.M.A., *Guides*, for the right side he found that EMG findings on the right in the September 10, 2014 study showed axonal loss, for a grade three modifier. Dr. Walker applied a grade modifier of zero for functional history and physical examination. He opined that he would not use the *Quick*DASH due to reliability issues. Dr. Walker found an average modifier of one and a final right upper extremity permanent impairment rating of one percent.

For the left wrist, Dr. Walker found that a postoperative EMG showed median motor amplitude of less than five, or axonal loss, for a grade three modifier. He applied a grade two modifier for decreased sensation and a grade modifier of three for history. Dr. Walker found an average grade modifier of three, for seven percent permanent impairment of the left upper extremity.

An OWCP medical adviser reviewed the evidence on March 21, 2016. He advised that diagnostic testing performed September 10, 2014 did not show axonal loss and that grip and pinch strength were nonspecific findings. The medical adviser also noted that Dr. Walker did not perform sensory testing. He concurred with Dr. Walker's finding of no impairment due to tenosynovitis. Using Table 15-23, the medical adviser applied a grade modifier of one bilaterally due to electrodiagnostic testing. He further applied a grade modifier of zero on the right and two on the left for physical findings of loss of two-point discrimination of the left hand and a grade modifier of zero for history on the right and one on the left. The medical adviser found that the functional history was not applicable because of the unreliable *Quick*DASH score. He opined that appellant had two percent permanent impairment of each upper extremity due to carpal tunnel syndrome.

By decision dated March 23, 2016, OWCP granted appellant a schedule award for two percent permanent impairment of each upper extremity. The period of the award ran for 12.48 weeks from February 1 to April 28, 2016.

On appeal counsel contends that the opinions of Dr. Platto and Dr. Walker are entitled to more weight than the opinion of OWCP's medical adviser because they performed physical examinations.

LEGAL PRECEDENT

The schedule award provision of FECA,[3] and its implementing federal regulations,[4] set forth the number of weeks of compensation payable to employees sustaining permanent

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[7] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[8] In Table 15-23, grade modifier levels (ranging from zero to four) are described for the categories of test findings, history, and physical findings. The grade modifiers are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value.

Section 8123(a) 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.[9] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10]

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome, tenosynovitis of the right wrist and hand, and synovitis and tenosynovitis of the left hand causally related to factors of his federal employment. A September 10, 2014 EMG and NCV studies showed moderately severe bilateral carpal tunnel syndrome, greater on the right side. Appellant underwent a left carpal tunnel release and flexor tenosynovectomy on April 23, 2015 and a right carpal tunnel release and flexor tenosynovectomy on June 25, 2015. On January 8, 2016 he filed a claim for a schedule award.

[5] *Id*. at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] A.M.A., *Guides* 494-531.

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

[9] 5 U.S.C. § 8123(a).

[10] 20 C.F.R. § 10.321.

The Board finds that the case is not in posture for decision due to a conflict in medical opinion. In a December 17, 2015 impairment evaluation, Dr. Platto, an attending physician, identified the diagnosis as carpal tunnel syndrome and advised that, under Table 15-23, appellant had a grade modifier of three on the right side due to axon loss as shown by test results, a grade modifier of one for a history of intermittent symptoms, a grade modifier of one for physical examination, and no grade modifier for the functional scale based on the *Quick*DASH results. He found an average grade modifier of two and four percent right upper extremity impairment. For the left side, Dr. Platto applied a grade modifier of three for test findings of axon loss, a grade modifier of one for a history of mild intermittent symptoms, and a grade modifier of two for physical findings of decreased two-point discrimination, for an average modifier of two and four percent impairment due to carpal tunnel syndrome. He further determined that appellant had three percent impairment due to reduced wrist motion as a result of tenosynovitis, for seven percent total upper extremity impairment bilaterally.

OWCP referred appellant to Dr. Walker for a second opinion examination. On February 1, 2016 Dr. Walker found that he had no impairment due to tenosynovitis, seven percent left upper extremity impairment due to carpal tunnel syndrome, and one percent right upper extremity impairment due to carpal tunnel syndrome. He opined that electrodiagnostic testing showed axonal loss on the right and left side.

An OWCP medical adviser, on March 21, 2016, determined that the September 10, 2014 EMG and NCV studies did not show axonal loss. Utilizing Table 15-23, for the left side he applied grade modifiers of one for test results, two for physical findings of loss of two-point discrimination, and one for history, which he found yielded a grade modifier of one. For the right side, the medical adviser applied a grade modifier of one for test results and history and zero for physical findings, for an average modifier of one. He found that the *Quick*DASH results were not reliable. The medical adviser determined that appellant had two percent permanent impairment of each upper extremity due to carpal tunnel syndrome and no impairment due to tenosynovitis.

The Board finds that a conflict exists between Dr. Platto, appellant's physician, and Dr. Walker, the second opinion physician, regarding the interpretation of the electrodiagnostic test results and the extent of his permanent impairment of the upper extremities. Section 8123(a) 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.[11] On remand, OWCP shall refer the case to an impartial medical specialist to resolve the conflict in medical opinion. After such further development as deemed necessary, it should issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

The Board finds that the case is not in posture for decision.

[11] 5 U.S.C. § 8123(a); *see also A.E.*, Docket No. 15-0496 (issued May 23, 2016).

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 4, 2016
Washington, DC

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

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

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