United States Department of Labor
Employees' Compensation Appeals Board

G.D., Appellant	)	
and	)	**Docket No. 16-1712**
	)	**Issued: August 11, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Youngstown, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 24, 2016 appellant, through counsel, filed a timely appeal of a July 1, 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 to consider the merits of this case.

ISSUE

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

[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.*

On appeal, counsel argued that OWCP's medical adviser relied on stale evidence and ignored relevant probative evidence.

FACTUAL HISTORY

On April 23, 2012 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2), alleging that he suffered from carpal tunnel syndrome as a result of repetitive motion of his hands during his federal employment. On July 24, 2012 OWCP accepted his claim for bilateral carpal tunnel syndrome.

On September 14, 2012 appellant stopped work to undergo an accepted right carpal tunnel release and right wrist flexor tenosynovectomy. He received wage-loss compensation and medical benefits on the supplement rolls from September 14 to October 27, 2012. On October 29, 2012 appellant returned to work full duty without restrictions. On January 18, 2013 he again stopped work to undergo a left carpal tunnel release with right flexor tenosynovitis. Appellant continued to receive compensation benefits on the supplemental rolls from January 18 to March 2, 2013. On March 5, 2013 he returned to work full duty without restrictions.

On June 3, 2014 appellant filed a schedule award claim (Form CA-7). In support of his claim, he submitted a July 10, 2014 medical report wherein Dr. Catherine Watkins Campbell, a physician Board-certified in occupational and family medicine, noted that appellant had reached maximum medical improvement on April 14, 2014. Dr. Watkins Campbell indicated that appellant reported bilateral incisional pain in both wrists and numbness in all the digits of the left hand and digits 2 through 5 of the right hand. She noted that he frequently dropped even light weight objects from both hands. On physical examination, Dr. Watkins Campbell noted a negative Tinel's sign and a negative Phalen's sign for each wrist, but noted a positive Tinel's sign in the left elbow. She noted that ratings for the condition of carpal tunnel syndrome were determined utilizing Table 15-23 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). Dr. Watkins Campbell noted a *Quick*DASH score of 25 which reflected mild functional problems. With regard to appellant's right carpal tunnel syndrome Dr. Watkins Campbell noted that the electromyogram/nerve conduction velocity (EMG/NCV) results were not available and as a result this modifier was not considered. A numerical value of 2 was assigned to the functional history based on significant intermittent symptoms. Dr. Watkins Campbell noted that muscle atrophy on physical examination qualified for a numerical value of 3. The average of these numbers was 2.5, which she rounded up to 3. As the functional history modifier of 1 was two grades lower than the final rating category of 3, Dr. Watkins Campbell assigned seven percent permanent right upper extremity impairment.

For the left carpal tunnel syndrome, the original EMG/NCV results were not available and as a result this modifier was not considered. A numerical value of 2 (significant intermittent symptoms) was assigned to the functional history. A numerical value of 2 was assigned based on the presence of decreased sensation on physical examination. The average of these numbers was 2. The functional history modifier of 1 is one grade lower than the final rating category of 3 and as a result four percent permanent left upper extremity impairment was assigned.

By letter dated April 29, 2015, OWCP asked its medical adviser to review Dr. Watkins Campbell's report. In an April 30, 2015 response, Dr. Morley Slutsky, a Board-

certified occupational medicine physician and an OWCP district medical adviser (DMA), noted that, prior to his carpal tunnel surgery, appellant had electrodiagnostic testing. He asked OWCP to obtain complete copies of these reports with all electrodiagnostic measurements.

By letter dated May 13, 2015, OWCP asked appellant to submit a copy of the electrodiagnostic testing performed prior to his carpal tunnel syndrome surgeries on September 14, 2012 and January 18, 2013. On May 26, 2015 it received the result of a March 6, 2012 EMG examination by Dr. Sean T. McGrath, a Board-certified physiatrist. Dr. McGrath found that the EMG evidence was consistent with severe right carpal tunnel syndrome and moderate left carpal tunnel syndrome. He also noted that there was no evidence of cervical radiculopathy.

In a July 3, 2015 report,[3] Dr. Slutsky reviewed the EMG report, and determined that appellant had two percent permanent impairment of his left upper extremity and two percent permanent impairment of his right upper extremity. He noted the difference between his conclusion and that of Dr. Watkins Campbell and based it on the fact that Dr. Watkins Campbell had not reviewed the EMG testing prior to providing the impairment rating. It would have impacted the grade modifiers. Dr. Slutsky noted that the electrodiagnostic criteria for allowing both median nerves to be rated using the compression neuropathy Table 15-23 (page 449) had been met, as the testing revealed conduction delay equal to a grade modifier of 1. With regard to history, he noted that appellant still had symptoms related to carpal tunnel syndrome, but that there was no documentation that appellant was unable to perform at least one of his activities of daily living or that there was a conduction block and/or axonal involvement on EMG/NCV testing. Therefore, it received a final grade modifier of 1. With regard to physical findings, Dr. Slutsky found a grade modifier of 2. He noted that appellant evidenced mild thenar atrophy, but no measurements had been provided. For the functional scale, he found a *Quick*DASH score of 25 percent which was classified as mild. Dr. Slutsky noted that the average of the three grade modifiers rounded to the nearest integer equaled 1, so no adjustment was made and the final bilateral upper extremity impairment was two percent.

By letter dated August 12, 2015, OWCP asked Dr. Watkins Campbell to consider Dr. Slutsky's report and comment on the degree of appellant's permanent impairment. By letter dated August 28, 2015, appellant, through counsel, indicated that Dr. Watkins Campbell was unable to provide a medical opinion and asked OWCP to proceed with a schedule award decision.

In a decision dated September 9, 2015, OWCP granted two percent permanent impairment of each upper extremity. It indicated that the weight of the medical evidence was represented by the opinion of OWCP's DMA, Dr. Slutsky, who properly applied the A.M.A., *Guides*.

By letter received by OWCP on September 16, 2015, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. At the hearing held on April 19, 2016, counsel contended that Dr. Slutsky was biased and consistently found against injured workers. He also contended that Dr. Slutsky erred by requesting the results of presurgery

[3] Dr. Slutsky's report was dated July 30, 2015. However, this date was in error, as the report was received by OWCP on July 6, 2015.

tests and argued that Dr. Slutsky had not examined appellant. Counsel further indicated that Dr. Watkins Campbell had reviewed Dr. Slutsky's report, but had no further comments.

By decision dated July 1, 2016, the hearing representative affirmed the September 9, 2015 decision.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[4] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides*, as the uniform standard applicable to all claimants.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[6]

The sixth edition requires identifying the impairment Class for Diagnosis (CDX), 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).[8]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[9] In Table 15-23, grade modifier levels (ranging from zero to four) are described by the categories of test findings, history, and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[10]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and

[4] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found.

[5] 20 C.F.R. § 10.404(a).

[6] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

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

[8] *Id.* at 521.

[9] *Id.* at 449.

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

percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[11]

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome. An EMG study conducted on March 6, 2012 was interpreted by Dr. McGrath as consistent with severe right carpal tunnel syndrome and moderate left carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on September 14, 2012 and a left carpal tunnel release on January 18, 2013. On June 3, 2014 appellant filed a claim for a schedule award.

Dr. Watkins Campbell, appellant's treating physician, noted that she could not apply the grade modifier for test findings as the EMG findings were not available. She determined that appellant had a bilateral grade modifier of 2 for functional history, and a grade modifier of 3 for the right upper extremity for physical examination and a grade modifier of 2 for the left upper extremity. Dr. Watkins Campbell indicated that, applying these findings to Table 15-23 of the A.M.A., *Guides*, appellant had seven percent right upper extremity permanent impairment and four percent left upper extremity permanent impairment. Dr. Slutsky, OWCP's DMA, reviewed appellant's history, Dr. McGrath's EMG report, and Dr. Watkins Campbell's report. He noted that Dr. Watkins Campbell should have reviewed the EMG testing prior to making a rating as it impacted the grade modifiers. He found that appellant had a bilateral grade modifier of 2 for history and a bilateral grade modifier of 2 for physical findings. Dr. Slutsky disagreed with Dr. Watkins Campbell's conclusion that appellant was entitled to a higher grade modifier for the physical examination of his right upper extremity and a higher finding for history. After applying the A.M.A., *Guides*, he opined that appellant had a two percent permanent impairment to each upper extremity.

The Board finds that the opinion of Dr. Slutsky, the DMA, represents the weight of the medical evidence. Both Dr. Slutsky and Dr. Watkins Campbell based their impairment rating due to appellant's accepted bilateral carpal tunnel syndrome on Table 15-23 of the A.M.A., *Guides*. Dr. Watkins Campbell, however, calculated her rating without the benefit of appellant's EMG/NCV tests at the time she made her impairment rating. As properly noted by Dr. Slutsky, Dr. Watkins Campbell should have reviewed the EMG/NCV testing prior to making the rating as this impacts the grade modifiers assigned.[12] Accordingly, Dr. Watkins Campbell did not properly apply the A.M.A., *Guides*. In addition, Dr. Watkins Campbell failed to adequately explain her rating with regard to functional history and physical findings for appellant's right upper extremity. To be of probative value, the medical evidence must describe the impairment in sufficient detail so that it can be visualized on review and utilized to compute the percentage of impairment in accordance with the A.M.A., *Guides*.[13] Dr. Watkins Campbell failed to adequately explain how the A.M.A., *Guides* supported her findings of a greater impairment. She declined when given the opportunity to discuss Dr. Slutsky's report.

[11] *See supra* note 6 at Chapter 2.808.6(f) (February 2013).

[12] A.M.A., *Guides* 448. The A.M.A., *Guides* clearly indicate that if the electrodiagnostic testing is normal or does not meet the standards as set forth by the A.M.A., *Guides*, that the person making the rating should not apply Table 15-23.

[13] *See B.J.*, Docket No. 16-364 (issued June 22, 2016).

Dr. Slutsky properly followed the A.M.A., *Guides* in reaching his conclusion that appellant had a two percent permanent impairment to each upper extremity. He reviewed the EMG/NCV testing and explained his findings with regard to history and physical examination by reviewing the medical findings in the record and applying them to the criteria set forth in the A.M.A., *Guides*. The well-rationalized opinion of Dr. Slutsky represents the weight of the medical evidence. Accordingly, the Board will affirm OWCP's determination that appellant had two percent permanent impairment of each upper extremity.

Appellant may request a schedule award or increased schedule award at any time 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 failed to establish more than two percent permanent impairment of each upper extremity for which he has previously received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 1, 2016 is affirmed.

Issued: August 11, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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