# United States Department of Labor
# Employees' Compensation Appeals Board

| | | |
|---|---|---|
| **V.C., Appellant** | ) | |
| | ) | |
| **and** | ) | **Docket No. 21-1228** |
| | ) | **Issued: April 7, 2022** |
| **DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Grand Coulee, WA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

### ***JURISDICTION***

On August 6, 2021 appellant filed a timely appeal from a May 20, 2021 merit 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 over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the May 20, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

## ***ISSUE***

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

## ***FACTUAL HISTORY***

On March 26, 2019 appellant, then a 61-year-old hydro mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral carpal tunnel syndrome due to factors of his federal employment, including repetitive spraying, brushing, rolling paint, and sandblasting during the prior 30 years of employment. He noted that he first became aware of his condition on February 7, 2017 and realized its relation to his federal employment on February 28, 2017. Appellant did not immediately stop work. OWCP accepted his claim for bilateral carpal tunnel syndrome.

An electromyogram and nerve conduction velocity (EMG/NCV) study performed on November 6, 2018 revealed evidence of entrapment neuropathy affecting the median nerve at the wrist as seen in bilateral carpal tunnel syndrome.

Appellant received treatment for his bilateral upper extremity condition from Dr. Jonothan L. Miller, a Board-certified orthopedic surgeon, who performed OWCP-authorized left carpal tunnel release surgery on February 26, 2019 and right carpal tunnel release and right ring trigger finger release on August 13, 2019.

In a June 1, 2020 report, Dr. Miller diagnosed bilateral carpal tunnel syndrome status post bilateral releases. Findings on examination of the elbows revealed full symmetric range of motion in flexion, extension, pronation, and supination bilaterally, the wrists had full symmetric extension to 50 degrees and flexion to 70 degrees bilaterally, and both surgical incisions were clean and well healed. Dr. Miller indicated that he would not perform a detailed sensory examination due to appellant's diabetes. Utilizing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] Table 16-32, page 509, he noted that normal grip strength for the dominant hand was 45.9 and for the nondominant hand was 43.5, which resulted in a strength loss index of 46.2 percent for the right hand and 51.5 percent for the left hand. Dr. Miller determined that appellant had 20 percent permanent impairment of the right and left upper extremities.

On June 8, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated June 15, 2020, OWCP informed appellant that the medical evidence of record was insufficient to establish his schedule award claim. It requested that he submit a detailed narrative medical report from his treating physician based upon a recent examination including a date of maximum medical improvement (MMI), the diagnosis upon which the impairment rating was based, a detailed description of any preexisting impairment, and a final rating of the permanent impairment and discussion of the rationale for calculation of the

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

impairment, with references to the applicable criteria and tables of the sixth edition of the A.M.A., *Guides*.[4]

OWCP received additional evidence. In a report dated June 22, 2020, Dr. Miller addressed OWCP's June 15, 2020 development letter and attached his clinic note dated June 1, 2020. He noted that appellant reached MMI and had no previous permanent impairment of either upper extremity. Dr. Miller diagnosed bilateral carpal tunnel syndrome and noted that appellant was status post carpal tunnel releases. He indicated that he previously provided an impairment rating using the fifth edition of the A.M.A., *Guides* and recommended sending appellant to another physician for a rating based on the sixth edition of the A.M.A., *Guides*.

On September 13, 2020 Dr. Morley Slutsky, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA), reviewed a statement of accepted facts and the medical record. He advised that Dr. Miller provided a very limited examination of appellant and did not perform a sensory examination given appellant's diabetes. The DMA advised that the median nerve was 90 percent sensory and Dr. Miller should have attempted to perform a complete neurologic examination to see if there were focal findings consistent with median nerve deficits. He further noted that Dr. Miller used grip strength measurements, which were not used to rate residual carpal tunnel syndrome and he failed to provide valid range of motion measurements pursuant to the A.M.A., *Guides*. The DMA further determined that Dr. Miller's clinical findings were of no use in determining an impairment rating for carpal tunnel syndrome as Dr. Miller used the fifth edition of the A.M.A., *Guides*, which was not consistent with OWCP requirements. He noted that MMI occurred on June 1, 2020 the date of Dr. Miller's examination.

Utilizing the sixth edition of the A.M.A., *Guides*, Table 15-23 (Entrapment/Compression Neuropathy Impairment), page 449, the DMA determined that the November 6, 2018 EMG/NCV study showed that appellant fell under grade modifier 1 for test findings because the study met the criteria for right carpal tunnel syndrome and demonstrated sensory and motor conduction delays associated with the median nerve. He assigned a grade modifier zero for history given that appellant had no symptoms related to carpal tunnel syndrome symptoms (without evidence that appellant was unable to perform at least one activity of daily living or that someone consistently did an activity of daily living for him). The DMA noted that he was unable to determine the grade modifier for physical findings because a proper neurologic examination was not performed. Averaging the three grade modifiers meant that appellant fell under grade modifier 1 on Table 15-23 with a default impairment value of two percent permanent impairment. The DMA indicated that the *Quick*DASH score was not performed and could not be determined. He concluded that appellant's condition did not warrant movement from the default impairment value of two percent permanent impairment and, therefore, the total permanent impairment of appellant's bilateral upper extremities was two percent. The DMA recommended referring appellant for a second opinion examination with a physician who knew how to perform a complete neurologic examination and was trained to use the A.M.A., *Guides*.

On April 8, 2021 OWCP referred appellant for a second opinion evaluation with Dr. Steven Nadler, a Board-certified orthopedic surgeon. In a May 12, 2021 report, Dr. Nadler discussed

[4] A.M.A., *Guides* (6th ed. 2009).

appellant's complaints of residual pain and numbness in appellant's fingers and wrists, and pain when grabbing things with his hands. He conducted a physical examination which revealed well-healed incisions over the palms of appellant hands, no tenderness over the carpal tunnels, negative Tinel's and Phalen's tests, normal sensory function in the upper extremities, normal sensation to light touch for all dermatomes, normal 5 millimeter two-point discrimination throughout all digits, intact motor strength in the upper extremities, normal muscle strength, and normal reflexes. Dr. Nadler noted intact range of motion of both shoulders and elbows, no tenderness of the medial or lateral epicondyle, negative Tinel's sign in the ulnar groove with no evidence of cubital tunnel syndrome, and 60 degrees of dorsiflexion and palmar flexion, 30 degrees of ulnar deviation, and 20 degrees of radial deviation in both wrists. He noted that appellant's complaints of stiffness in the fingers might be related to early age-related degenerative changes and stiffness throughout all joints of both hands. Dr. Nadler determined MMI was May 12, 2021, the date of his examination. He noted that an EMG/NCV study dated November 6, 2018 revealed evidence of bilateral carpal tunnel syndrome. Dr. Nadler provided an impairment rating utilizing Table 15-23 of the sixth edition of the A.M.A., *Guides*. He diagnosed bilateral carpal tunnel syndrome and status post bilateral carpal tunnel release. Dr. Nadler found no impairment rating at this time, as appellant reported that the numbness in his fingers was almost completely gone, he had normal 5 millimeter two-point discrimination throughout all digits, and excellent range of motion. He concluded that appellant had zero percent permanent impairment of the bilateral upper extremities.

By decision dated May 20, 2021, OWCP denied appellant's claim for a schedule award, finding that he had not established permanent impairment of a scheduled member or function of the body in accordance with the A.M.A., *Guides*. It found that the weight of the medical evidence rested with the May 12, 2021 report of Dr. Nadler, who determined that appellant had no permanent impairment of his bilateral upper extremities.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA[5] and its implementing regulations[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or 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*, published in 2009.[7] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award

[5] *Supra* note 1.

[6] 20 C.F.R. § 10.404.

[7] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id*. at Chapter 3.700, Exhibit 1 (January 2010).

purposes.[8] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included.[9]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[10] In Table 15-23, grade modifier 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 value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[11]

OWCP's 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 percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[12]

## ***ANALYSIS***

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In his June 1, 2020 report, Dr. Miller opined that appellant had 20 percent permanent impairment of each upper extremity due to appellant's accepted bilateral carpal tunnel syndrome. OWCP advised him of the requirements of the sixth edition of the A.M.A., *Guides*. In his June 1, 2020 report, Dr. Miller utilized the fifth edition of the A.M.A., *Guides*, rather than the sixth edition, to rate appellant's impairment of the bilateral upper extremities.[13] Thus, his report was of diminished probative value.

On September 13, 2020 the DMA reviewed Dr. Miller's report and determined that it was of limited probative value as Dr. Miller utilized the fifth edition of the A.M.A., *Guides*, rather than the sixth edition, to rate appellant's impairment of the bilateral upper extremities.[14] He recommended referring appellant for a second opinion examination with a physician who knew how to perform a complete neurologic examination and was trained to use the A.M.A., *Guides*.

[8] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] *P.R.*, *id*.; *Carol A. Smart*, 57 ECAB 340 (2006).

[10] A.M.A., *Guides* 449, Table 15-23; 449. *See also L.G.*, Docket No. 18-0065 (issued June 11, 2018).

[11] *Id*. at 448-49.

[12] *See supra* note 7 at Chapter 2.808.6(d) (March 2017).

[13] *D.T.*, Docket No. 12-0503 (issued August 21, 2012); *supra* note 7 at Chapter 2.808.6.6a (March 2017); *see also id*. Chapter 3.700.2 and Exhibit 1 (January 2010); *J.R.*, Docket No. 16-1904 (issued September 14, 2017).

[14] *Id*.

OWCP properly referred appellant for a second opinion evaluation with Dr. Nadler, who provided an impairment rating utilizing Table 15-23 of the sixth edition of the A.M.A., *Guides*. Dr. Nadler determined that appellant had zero percent permanent impairment of each upper extremity due to his accepted bilateral carpal tunnel syndrome. He noted no tenderness over the carpal tunnels, negative Tinel's and Phalen's tests, normal sensory function in the upper extremities, normal sensation to light touch in all dermatomes, normal 5 millimeter two-point discrimination throughout all digits, intact motor strength in the upper extremities, normal muscle strength, normal reflexes, and 60 degrees of dorsiflexion and palmar flexion, 30 degrees of ulnar deviation, and 20 degrees of radial deviation in both wrists. Dr. Nadler noted an EMG/NCV study dated November 6, 2018 revealed evidence of bilateral carpal tunnel syndrome. Utilizing the A.M.A., *Guides*, he found that appellant's motor conduction delay would place him in grade modifier 1 of Table 15-23. Dr. Nadler found that appellant's history of no symptoms, with normal physical examination findings, would result in the default rating of zero.[15] Therefore, he concluded that, pursuant to Table 15-23, appellant had zero percent permanent impairment of the bilateral upper extremities.

The Board, thus, finds that the well-rationalized opinion of the second opinion physician represents the weight of the medical evidence regarding permanent impairment of appellant's bilateral upper extremities.[16]

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 permanent impairment.

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

[15] Pursuant to Table 15-23, page 449 of the A.M.A., *Guides*, the average of the three grade modifiers (EMG/NCV study test of 1, history of zero, and physical examination of zero) was .33, rounded to the nearest integer was zero.

[16] *See G.D.*, Docket No. 16-1712 (issued August 11, 2017).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 20, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board