United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 19-0086**
	)	**Issued: February 10, 2021**
DEPARTMENT OF LABOR, WAGE & HOUR DIVISION, Baltimore, MD, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 15, 2018 appellant filed a timely appeal from a September 13, 2018 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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish permanent impairment of her right upper extremity, warranting a schedule award; and (2) whether appellant has met her burden of proof to establish that OWCP should expand the acceptance of her claim to include additional right upper extremity conditions causally related to her accepted employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 19, 2011 appellant, then a 37-year-old wage and hour technician, filed an occupational disease claim (Form CA-2) alleging that she sustained right wrist pain and numbness and periodic pain in her forearm, elbow, and right shoulder causally related to factors of her federal employment. She noted that she first became aware of her condition on April 1, 2003 and attributed it to her federal employment on May 1, 2011. OWCP accepted the claim for tenosynovitis of the right hand and wrist. Appellant worked with restrictions following her injury.

On November 11, 2011 Dr. Bruce S. Wolock, a Board-certified orthopedic surgeon, diagnosed persistent extensor carpi ulnaris tendinitis of the right wrist and a possible triangular fibrocartilage complex (TFCC) tear. He attributed appellant's right wrist symptoms to her repetitive employment duties, including typing and writing.

In a progress report dated August 17, 2012, Dr. Wolock diagnosed right medial epicondylitis and recommended an ergonomic assessment of appellant's workstation.

On June 1, 2015 appellant advised OWCP that she had continued pain and required medical treatment.

In a July 31, 2015 report, Dr. Wolock, noted that appellant's right arm had "been bothering her recently." He diagnosed right lateral epicondylitis and a right wrist strain. On August 28, 2015 Dr. Wolock diagnosed persistent right lateral epicondylitis.

In a progress report dated October 23, 2015, Dr. Wolock discussed appellant's complaints of continued right elbow pain. He found mild tenderness of the right lateral epicondyle with normal sensation of the fingers and a negative Tinel's sign at the cubital tunnel.

On November 30, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a January 8, 2016 letter, OWCP advised appellant that the evidence submitted did not establish that she had reached maximum medical improvement (MMI) with regard to her accepted employment injury. It further noted that Dr. Wolock had diagnosed right medial epicondylitis, which OWCP had not accepted as employment related.

On January 15, 2016 Dr. Wolock advised that appellant had medial and lateral right elbow pain and numbness of the small finger that increased with typing. He diagnosed mild medial and lateral epicondylitis and cubital tunnel syndrome.

In a progress report dated July 15, 2016, Dr. Wolock noted that appellant had persistent right arm pain, particularly laterally. He diagnosed right lateral epicondylitis.

On August 26, 2016 Dr. Wolock related that appellant had occasional pain, especially at the lateral epicondyle, with normal elbow motion and sensation. He opined that she had reached MMI and released her from care.

In an October 13, 2016 letter, OWCP requested that appellant submit a detailed report from a physician addressing whether she had reached MMI and evaluating the extent of any permanent

impairment as a result of her accepted employment injury in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*).[2]

On October 17, 2016 appellant advised OWCP that Dr. Wolock did not perform impairment evaluations using the sixth edition of the A.M.A., *Guides*.

In a December 14, 2016 letter, appellant requested that OWCP expand acceptance of her claim to include a right elbow condition.

Thereafter, appellant submitted a chart note from Dr. Wolock advising that he had initially evaluated her on July 31, 2015 for an employment-related right elbow and wrist injury. He indicated that he had diagnosed right lateral epicondylitis and a right wrist sprain. Dr. Wolock opined that appellant had reached MMI.

On August 29, 2017 Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted his review of a statement of accepted facts (SOAF) and appellant's medical records for the purpose of providing a medical opinion regarding whether the claim should be expanded to include the additional conditions diagnosed by Dr. Wolock based upon his own review of the medical records. The DMA opined that, based on the criteria set forth in the second edition of the A.M.A., *Guides to the Evaluation of Disease and Injury Causation*,[3] the work duties required by her administrative position would not be sufficient to cause work-related lateral epicondylitis. He attributed appellant's epicondylitis to an idiopathic condition. The DMA recommended that OWCP refer her for a second opinion examination to determine whether she had permanent impairment as a result of her accepted employment-related condition, noting that any impairment due to her lateral epicondylitis would not be considered work related.

On September 7, 2017 OWCP referred appellant to Dr. Willie Thompson, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether she had a permanent impairment due to the accepted condition of tenosynovitis of the right hand and wrist and whether the additional diagnosed right upper extremity conditions were employment related.

In a report dated September 22, 2017, Dr. Thompson noted his review of a SOAF and the medical record. On examination he found normal range of motion (ROM) of the right shoulder, elbow, wrist, and hand with no muscle wasting or atrophy, and intact neurovascular status. Dr. Thompson observed no tenderness to percussion at the elbow over the lateral and medal epicondyle, or the olecranon process and intact sensation of the right forearm with no muscle wasting or atrophy. He found a negative Tinel's sign at the medial nerve of the right wrist and noted that June 5, 2003 electrodiagnostic testing was normal. Dr. Thompson concluded that appellant's tenosynovitis of the right hand and wrist had resolved. He opined that his examination findings failed to support the diagnosed conditions of right epicondylitis, a right wrist sprain, cubital tunnel syndrome, or right arm tendinitis. Dr. Thompson found that appellant had zero

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

[3] A.M.A., *Guides to the Evaluation of Disease and Injury Causation* (2nd ed. 2013).

percent permanent impairment of the right upper extremity under the A.M.A., *Guides* as she had no residuals of her accepted condition.

OWCP determined that a conflict existed between Dr. Thompson and Dr. Wolock regarding whether appellant's claim should be expanded to accept additional right upper extremity conditions. It referred her to Dr. David Lumsden, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated November 17, 2017, Dr. Lumsden noted his review of the SOAF and the medical record. He discussed appellant's complaints of pain in the right elbow, wrist, hand, and distal radial and ulnar joints, decreased mobility of the small finger on the right, and numbness of the small right finger after typing. Dr. Lumsden found a normal neurovascular assessment on examination of the right upper extremity with no loss of motion, weakness, or atrophy. He further found a negative Tinel's sign at the cubital and carpal tunnel. Dr. Lumsden noted appellant's history of a 2005 MRI scan of the right wrist showing a low-grade TFCC tear. He determined that she had reached MMI for the right upper extremity injury. Dr. Lumsden opined that appellant had zero percent permanent impairment based on the normal physical examination findings showing no diagnosis-based impairment (DBI) or impairment due to loss of range of motion (ROM) under the A.M.A., *Guides*.

On the issue of claim expansion, Dr. Lumsden diagnosed lateral epicondylitis and right wrist pain. He found no indications or complaints supporting the diagnoses of de Quervain's tendinitis, tenosynovitis, or cubital tunnel syndrome. Dr. Lumsden advised that the diagnosed right lateral epicondylitis was mild and not employment related. He noted his review of the opinions of Dr. Wolock and Dr. Thompson and opined that he agreed with Dr. Thompson that the additional diagnoses had either not been substantiated or had resolved.

By decision dated April 6, 2018, OWCP denied appellant's schedule award claim and her request that her claim be expanded to include additional right upper extremity conditions as work related. It accorded the special weight of the medical evidence to Dr. Lumsden.

On April 19, 2018 appellant requested a review of the written record by a representative of the OWCP's Branch of Hearings and Review.

Thereafter, appellant submitted medical evidence from 2003 and 2004 relevant to a state workers' compensation claim. In an August 15, 2003 report, Dr. Howard Siu, a Board-certified neurologist, noted that appellant had worked for a non-federal employer as a program specialist from 2001 to May 2003 performing computer keyboard work.

By decision dated September 13, 2018, OWCP's hearing representative affirmed the April 6, 2018 decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] set forth the number of weeks of compensation payable to employees sustaining permanent 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.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

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).[8] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

FECA Bulletin No. 17-06 provides guidance in applying ROM or DBI methodologies in rating permanent impairment of the upper extremities.[12] Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

> "As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (via the updated instructions noted above) to the rating physician(s).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] *Id*. at 494-531.

[10] *Id*. 411.

[11] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[12] FECA Bulletin No. 17-06 (May 8, 2017).

"Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the [A.M.A.,] Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used*." (Emphasis in the original).[13]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision

The FECA Bulletin No. 17-06 requires OWCP to develop the medical evidence of record as to the extent of permanent impairment by following the new procedures.[14] The Board finds that OWCP did not properly develop the medical evidence pursuant to FECA Bulletin No. 17-06, which requires that it should instruct an evaluating physician to obtain three independent measurements of ROM loss, if they have not been provided into the record.[15] It was incumbent upon the evaluator, when performing the ratings under both the ROM and DBI methods, to obtain the necessary ROM measurements to complete the full rating.[16] No such development occurred in this case. In finding that appellant had no ratable permanent impairment of the right upper extremity, OWCP relied upon the November 17, 2017 report of Dr. Lumsden, who acted as a second opinion examiner on the issue of whether appellant had a permanent impairment of the right upper extremity due to her accepted employment injury. Dr. Lumsden found that appellant had no impairment using either the ROM method or the DBI methodologies. He did not, however, provide three independent ROM measurements in reaching his impairment evaluation, as required.

As OWCP failed to follow the procedures outlined in FECA Bulletin No. 17-06, the case will be remanded for further development consistent with OWCP's procedures found in FECA Bulletin No. 17-06.[17] Following this and such further development as deemed necessary, it shall issue a *de novo* decision.[18]

[13] *Id*.

[14] *D.M.*, Docket No. 18-0985 (issued November 4, 2019).

[15] *V.H.*, Docket No. 18-0848 (issued February 25, 2019); *T.R.*, Docket No. 17-1961 (issued December 20, 2018).

[16] *See M.D.*, Docket No. 18-1073 (issued January 18, 2019)

[17] *See R.T.*, Docket No. 18-1581 (issued April 19, 2019); *R.A.*, Docket No. 18-1331 (issued April 24, 2019).

[18] *See J.R.*, Docket No. 19-0217 (issued July 25, 2019).

LEGAL PRECEDENT -- ISSUE 2

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[19]

Causal relationship is a medical question that requires medical opinion evidence to resolve the issue.[20] The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.[21]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[22] 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.[23] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[24]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish that OWCP should expand acceptance of her claim to include additional right upper extremity conditions causally related to her accepted employment injury.

OWCP properly determined that a conflict in medical evidence existed between appellant's treating physician, Dr. Wolock, who diagnosed additional employment-related conditions, including right lateral epicondylitis and a right wrist sprain, and Dr. Thompson, who found that the additional diagnosed conditions were unrelated to the accepted employment injury. It referred her to Dr. Lumsden for an impartial medical examination to resolve the conflict in medical evidence, pursuant to 5 U.S.C. § 8123(a).

In a report dated November 17, 2017, Dr. Lumsden reviewed appellant's symptoms of right elbow, wrist, and hand pain with loss of mobility and numbness of the small right finger. He

[19] *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[20] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[21] *Id*.

[22] 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

[23] 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

[24] *See Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

found that she did not have de Quervain's tendinitis, tenosynovitis, or cubital tunnel syndrome. Dr. Lumsden diagnosed mild right lateral epicondylitis unrelated to employment and right wrist pain. He found no evidence of additional employment-related diagnoses based on his examination findings.

The Board finds that Dr. Lumsden accurately described the accepted employment injury and noted his review of the medical record, including the SOAF. He performed a thorough clinical examination and provided detailed findings. Dr. Lumsden is a specialist in the appropriate field and reached a reasoned conclusion regarding whether appellant's claim should be expanded, noting that there was no basis to find causal relationship between additional right upper extremity conditions and the accepted employment injury.[25] His opinion, as set forth in his November 17, 2017 report, constitutes probative and reliable evidence. The Board, therefore, finds that Dr. Lumsden's opinion is entitled to the special weight accorded to an IME with regard to the issue of whether acceptance of appellant's claim should be expanded to include additional right upper extremity conditions.[26] Consequently, appellant has not met her burden of proof to expand the accepted conditions of her claim.

Following Dr. Lumsden's report, appellant submitted medical evidence from 2003 and 2004 regarding a state workers' compensation claim. As this evidence does not address whether appellant sustained additional conditions causally related to the accepted employment injury, it lacks probative value.[27]

On appeal appellant reiterates that she has sustained additional conditions due to factors of her federal employment. As explained above, however, the medical evidence is insufficient to support expanding her claim to include additional diagnosed conditions.[28]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that this case is not in posture for decision on the issue of whether appellant has met her burden of proof to establish permanent impairment of her right upper extremity, warranting a schedule award. The Board further finds that she has not met her burden of proof to establish expansion of the acceptance of her claim to include additional right upper extremity conditions causally related to her accepted employment injury.

[25] *See D.S.*, Docket No. 18-0353 (issued February 18, 2020).

[26] *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *M.M.*, Docket No. 16-1655 (issued April 4, 2018).

[27] *See S.W.*, Docket No. 19-1579 (issued October 9, 2020).

[28] *See E.W.*, Docket No. 20-0338 (issued October 9, 2020).

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 10, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board