United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 20-0874**
	)	**Issued: February 3, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Waltham, MA, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 11, 2020 appellant, through counsel, filed a timely appeal from a February 19, 2020 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) an 501.3, the Board has jurisdiction over the merits of this case.

[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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of her upper extremities, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[3] The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On March 25, 2001 appellant, then a 51-year-old automation clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral wrist conditions due to employment factors such as culling and bundling mail. OWCP assigned the claim OWCP File No. xxxxxx012 and accepted it for bilateral carpal tunnel syndrome and other bilateral median nerve lesions.[4]

March 21, 2003 electromyography and nerve conduction velocity (EMG/NCV) studies demonstrated mild/moderate left carpal tunnel syndrome and moderate right carpal tunnel syndrome.

On February 10, 2016 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, she submitted a September 1, 2016 report by Dr. Joseph B. Fitzgerald, a Board-certified orthopedic surgeon, who provided a history of injury and treatment. On examination, Dr. Fitzgerald noted full range of motion of the hands and wrists bilaterally, negative Phalen's test bilaterally, negative Tinel's sign at both elbows and wrists, well-healed surgical scars on both wrists, slight tenderness and prominence at the basal joint (first carpal-metacarpal joint) of both hands, and a normal motor and sensory examination of both hands. He specified that appellant reported no numbness or tingling in her hands. Dr. Fitzgerald diagnosed bilateral carpal tunnel syndrome. He opined that appellant had attained maximum medical improvement (MMI) in November 2000. Dr. Fitzgerald noted a *Quick*DASH score of 55. He also noted that June 1999 electrodiagnostic studies demonstrated a conduction delay. Referencing Table 15-23 on page 449 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] Dr. Fitzgerald assigned a grade modifier for clinical studies (GMCS) of 1 due to conduction delay on preoperative electrodiagnostic testing, a grade modifier for functional history (GMFH) of 1 for mild intermittent symptoms, a grade modifier for physical examination (GMPE) of 1 for normal findings on examination. He indicated that the grade modifiers and *Quick*DASH score raised the default two percent impairment rating upward to three

[3] *Order Remanding Case*, Docket No. 10-1614 (issued May 12, 2011).

[4] Prior to appellant's March 25, 2001 occupational disease claim, OWCP accepted that she sustained bilateral carpal tunnel syndrome under OWCP File No. xxxxxx266 on or before October 12, 1999. It administratively combined OWCP File No. xxxxxx266 with OWCP File No. xxxxxx012, the latter serving as the master file. Appellant underwent an OWCP authorized right carpal tunnel release on June 6, 2000 and an OWCP-authorized left carpal tunnel release on August 4, 2000.

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

percent. Dr. Fitzgerald therefore opined that appellant had sustained three percent permanent impairment of each upper extremity as a result of the accepted work injury.

On March 1, 2017 OWCP routed the case file and a statement of accepted facts (SOAF) to an OWCP district medial adviser (DMA) for review. In a March 14, 2017 report, Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a DMA, opined that appellant had attained MMI as of September 1, 2016 the date of Dr. Fitzgerald's examination. He concurred with Dr. Fitzgerald that she had GMCS of 1 for test findings and clinical findings, but found no GMPE modifier as she had a normal motor and sensory examination and a negative Phalen's test bilaterally. Dr. Slutsky concluded that the evidence of record did not demonstrate that appellant sustained permanent impairment of either upper extremity.

On April 17, 2017 OWCP forwarded Dr. Slutsky's report to Dr. Fitzgerald for his review. In response, Dr. Fitzgerald submitted an April 27, 2017 supplemental report, noting that he had not changed his opinion that appellant had sustained a three percent permanent impairment of each upper extremity as a result of the accepted bilateral upper extremity conditions. He explained that she had a GMFH of 1 as she had mild intermittent carpal tunnel syndrome controlled with medication at the time of her evaluation. Dr. Fitzgerald also noted that Table 15-23 allowed the clinician to select a GMPE of either zero or 1. He chose a grade modifier of 1, whereas Dr. Slutsky selected a grade modifier of zero.

On March 27, 2019 OWCP referred the case to an OWCP DMA for calculation of the appropriate percentage of permanent impairment. In a report dated April 20, 2019, Dr. Slutsky again opined that appellant had zero percent permanent impairment of each upper extremity causally related to the accepted bilateral upper extremity conditions. He noted that Dr. Fitzgerald's examination was deficient with regard to clinical information provided and that a more detailed physical examination may change the impairment rating.

On June 13, 2019 OWCP referred appellant, the medical record, an updated SOAF, and a series of questions to Dr. Bruce Leslie, a Board-certified orthopedic surgeon, for a second opinion regarding the appropriate percentage of permanent impairment of both upper extremities. In a report dated July 11, 2019, Dr. Leslie noted her history of injury and treatment and noted that he had reviewed the medical record and SOAF. He found that appellant had attained MMI as of November 15, 2000. On examination, Dr. Leslie observed no visible incisions from carpal tunnel surgery, normal light touch sensation in the volar aspect of the thumb, index, middle, right, and little fingers bilaterally, and bilaterally negative Tinel's and Durkin's tests. He noted that appellant reported no carpal tunnel pain or any numbness of tingling in either hand. While appellant described subjective discomfort in other areas of her body attributable to fibromyalgia, this was unrelated to the accepted bilateral carpal tunnel syndrome. Referencing Table 15-23, Dr. Leslie found that her:

> "[T]est findings represent grade modifier 1, conduction delay in the sensory or motor component. [Appellant's] history and physical findings are normal. She ha[d] no symptoms and no findings. This corresponds to a grade modifier of 0. Adding [appellant's] grade modifiers (1+0+0) represents a combined grade modifier of 1, which when divided by 4 represents an upper extremity impairment

of 0. In other words, [appellant's] permanent partial impairment for each upper extremity based on her bilateral carpal tunnel disease is 0 percent."

Dr. Leslie noted his agreement with Dr. Slutsky's calculation and his disagreement with Dr. Fitzgerald's impairment rating.

By decision dated August 16, 2019, OWCP denied the claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On August 20, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, held December 5, 2019.

By decision dated February 19, 2020, OWCP's hearing representative affirmed OWCP's August 16, 2019 decision, finding that Dr. Leslie's report represented the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing regulations[7] 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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[9]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must identify the impairment class of diagnosis (CDX), which is then adjusted by GMFH, GMPE, and/or GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids, and calculations of modifier scores.[12]

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*. at § 10.404 (a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* 383-492; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[11] *Id*. at 411.

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

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[13] 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 value may be modified up or down based on functional scale, an assessment of impact on daily living activities.[14]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[15] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[16] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist 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.[17]

ANALYSIS

The Board finds that this case is not in posture for decision due to a conflict in medical opinion.

In a September 1, 2016 impairment evaluation, Dr. Fitzgerald determined that, according to Table 15-23 on page 449 of the A.M.A., *Guides*, appellant had a GMCS of 1 showing a nerve conduction delay, a GMPE of 1 for normal findings on examination, and a GMFH of 1 for mild intermittent symptoms, which yielded an average grade modifier of 1. He adjusted the default two percent impairment rating up based on her *Quick*DASH score to find three percent permanent impairment of each upper extremity.

Dr. Slutsky, a DMA, reviewed Dr. Fitzgerald's report and advised that appellant had no permanent impairment of either upper extremity. In a supplemental report, Dr. Fitzgerald explained that he selected the higher of two permissible grade modifiers for physical findings, and that Dr. Slutsky chose the lower resulting in no permanent impairment rating. In response, Dr. Slutsky reiterated that appellant had no permanent impairment of either upper extremity.

On July 11, 2019 Dr. Leslie, an OWCP referral physician, found that appellant had negative Tinel's and Durkin's tests bilaterally and no other objective indication of carpal tunnel

[13] A.M.A., *Guides* at 449.

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

[15] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[16] 20 C.F.R. § 10.321.

[17] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

syndrome. He found that she had no permanent impairment due to the accepted bilateral carpal syndrome and that he disagreed with Dr. Fitzgerald's impairment rating.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint an impartial medical specialist who shall make an examination.[18] The Board finds that there is a conflict in medical opinion between Dr. Fitzgerald, appellant's treating physician, and Dr. Slutsky, the DMA and Dr. Leslie, OWCP's second opinion physician regarding whether appellant has objective findings of carpal tunnel syndrome causing a permanent impairment of the upper extremities.[19] Therefore, the case must be remanded to OWCP for referral of her to an impartial medical examiner for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).[20] After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[18] *See supra* note 15; *see also C.S.*, Docket No. 19-0731 (issued August 22, 2019).

[19] *See C.S.*, *id*. *See also K.E.*, Docket No. 17-0863 (issued October 5, 2017).

[20] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 3, 2021
Washington, DC

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

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

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