United States Department of Labor
Employees' Compensation Appeals Board

P.P., Appellant	)	
and	)	**Docket No. 20-1228**
	)	**Issued: February 5, 2021**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Chicago, IL, 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 May 29, 2020 appellant, through counsel, filed a timely appeal from an April 24, 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) and 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 right upper extremity, warranting a schedule award.

FACTUAL HISTORY

On September 1, 2009 appellant, then a 59-year-old secretary, filed an occupational disease claim (Form CA-2) alleging that she developed right carpal tunnel syndrome (CTS) as a result of her daily and repetitive use of a mouse and keyboard. OWCP accepted the claim for right CTS.

On January 25, 2016 appellant filed a claim for a schedule award (Form CA-7).

OWCP, in a February 23, 2016 development letter, requested that appellant submit an impairment evaluation from her attending physician addressing whether she had reached maximum medical improvement (MMI) and, if so, the extent of any permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] It afforded her 30 days to submit the necessary evidence.

Appellant submitted a May 3, 2016 medical report by Dr. Neil Allen, Board-certified in internal medicine and neurology. Dr. Allen reviewed her history and detailed the findings of his April 22, 2016 physical examination of her right wrist. He related that August 20, 2009 electromyogram/nerve conduction velocity (EMG/NCV) studies of the bilateral upper extremity revealed electrical evidence of a mild right median neuropathy with conduction slowing seen across the palm and wrist consistent with a mild right CTS. Dr. Allen indicated that, with reasonable certainty, appellant had reached MMI.

Dr. Allen opined that appellant had six percent right upper extremity permanent impairment for right CTS utilizing the sixth edition of the A.M.A., *Guides*. He referenced Table 15-23, page 449, for Entrapment/Compression Neuropathy Impairment and assigned a grade modifier for clinical studies (GMCS) of 1 for test findings due to conduction delay. Dr. Allen also reported a grade modifier for functional history (GMFH) of 3 for constant symptoms and a grade modifier for physical findings (GMPE) of 3 due to weakness with a *Quick*DASH score of 68. He concluded that, according to page 448 of the A.M.A., *Guides*, "Rating Process," appellant had six percent right upper extremity permanent impairment.

In a September 25, 2016 report, Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), found that appellant had zero percent permanent impairment of the right upper extremity. He referenced Table 15-23, page 449 and noted grade modifiers of 0 for GMCS for normal electrodiagnostic studies, 0 for GMFH for constant symptoms in the ulnar nerve distribution, and 0 for GMPE had a normal sharp/dull discrimination and was negative for atrophy. The DMA found that the *Quick*DASH score of 68 was not applicable due to functional history. After reviewing the submitted medical records, he advised that it was apparent that the diagnosis of right CTS was made on the basis of one abnormal

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

median-ulnar differential latency on the EMG/NCV studies performed on August 20, 2009. The DMA noted that appellant never actually had the symptoms or physical findings that were characteristic of CTS. On this basis he opined that there was no evidence that she has or had right CTS and, therefore, concluded that there was no impairment for this diagnosis. The DMA reported a date of MMI of April 22, 2016, the date of Dr. Allen's impairment evaluation.

On December 14, 2016 OWCP declared a conflict in medical opinion between appellant's physician, Dr. Allen, and DMA Dr. Slutsky with regard to the extent of her permanent impairment due to the accepted employment injury. On January 9, 2017 it referred her, a statement of accepted facts, the medical record, and a list of questions to Dr. Craig S. Williams, a Board-certified orthopedic surgeon, selected as the impartial medical examiner (IME) to resolve the conflict in the medical opinion evidence. Appellant did not attend the scheduled medical examination.[4]

Subsequently, on May 12, 2017 OWCP again referred appellant to Dr. Williams. In a June 14, 2017 report, Dr. Williams noted her history of injury and his review of the medical records. He noted that the August 20, 2009 EMG was within normal limits, although relative criteria comparing latencies of the median to the ulnar nerve, suggested a right mild CTS. Dr. Williams also noted physical examination findings of the bilateral upper extremities and x-ray examination findings of the right wrist. He indicated that Dr. Allen's evaluation did not note any suggestion of physical findings of CTS with the exception of abductor or oppositional strength of 3/5. Dr. Williams observed that his own examination did not suggest any weakness of abduction or thenar atrophy. He advised that he could not conclude that appellant had a diagnosis of CTS based on the technically normal 2009 EMG, which was characterized as mild CTS on the basis of relative differential values of median and ulnar latencies. Dr. Williams maintained that such a diagnosis was inconsistent with her history, complaints, and physical examination. He concluded that appellant had no permanent impairment attributable to a diagnosis of CTS.

OWCP, by decision dated July 11, 2017, denied appellant's schedule award claim. It noted that the schedule award determination was based on the June 14, 2017 report of Dr. Williams. OWCP noted that Dr. Williams should be treated as a second opinion physician rather than an IME as a second opinion physician examination would be the appropriate examination to resolve the issue of appellant's entitlement to a schedule award.

On July 17, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on January 11, 2018.

By decision dated March 21, 2018, an OWCP hearing representative set aside the July 11, 2017 decision, finding that there was a conflict in the medical opinion evidence between Dr. Allen, appellant's physician, and Dr. Williams, OWCP's second opinion physician, regarding whether

[4] By decision dated April 24, 2017, OWCP suspended appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d), effective April 21, 2017, due to her failure to attend the scheduled medical examination. On May 1, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. Appellant subsequently attended the rescheduled examination performed by Dr. Williams on June 14, 2017. By decision dated January 2, 2018, an OWCP hearing representative affirmed the April 24, 2017 decision.

appellant had a diagnosis of right CTS and any resultant permanent impairment due to this condition. Thus, the hearing representative remanded the case for a *de novo* decision.

On June 25, 2018 OWCP referred appellant to Dr. John I. Kung, a Board-certified orthopedic surgeon specializing in hand surgery, selected as the IME to resolve the conflict in the medical opinion evidence.

Dr. Kung, in an August 3, 2018 report, reviewed appellant's medical records. He reported normal findings on physical examination of her neck and bilateral shoulders, elbow, wrists, hands and forearms. Dr. Kung opined that appellant did not have a diagnosis of right CTS. He noted that the August 2009 EMG of the right upper extremity was normal and the NCV study of even date was mildly abnormal. Dr. Kung further noted that appellant's symptoms, examination findings, and lack of improvement with splinting were completely inconsistent with a diagnosis of CTS. He, therefore, concluded that, as she did not have a diagnosis of CTS, he could not provide an impairment rating.

OWCP, in a September 12, 2018 decision, denied appellant's claim for a schedule award. It found that the opinion of Dr. Kung as the IME represented the special weight of the evidence and established that she had no work-related CTS and, therefore, no permanent impairment of the right upper extremity.

On September 19, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on February 12, 2019.

By decision dated April 30, 2019, an OWCP hearing representative set aside the September 12, 2018 decision and on remand directed OWCP to obtain a supplemental report from Dr. Kung after advising him that appellant's claim had been accepted for right CTS and that he must explain whether she had permanent impairment of the right extremity pursuant to the sixth edition of the A.M.A., *Guides* caused by the accepted condition.

In a supplemental report dated November 21, 2019, Dr. Kung acknowledged the accepted condition of right CTS. He advised, however, that there was no objective evidence to support the presence of impairment or residuals related to the accepted condition. Dr. Kung noted that the August 2009 EMG/NCV studies found that screening NCV studies showed that the right median sensory latency was mildly prolonged when compared to the neighboring ulnar sensory response. The right median distal motor latency was borderline. The EMG/NCV studies also found electrical evidence consistent with a mild right median neuropathy with conduction slowing seen across the palm and wrist consistent with a mild CTS. Dr. Kung related that it appeared a diagnosis of right CTS was made based on the differential in the sensory latency of the right median versus the right ulnar nerve. He indicated, however, that according to page 449 of the sixth edition of the A.M.A., *Guides*, for individuals whose only nerve conduction abnormality was relatively prolonged median ulnar or radial nerve latencies compared with the other upper extremity nerve latencies or similar distances, the diagnosis of CTS or ulnar nerve compressive or impairment rating had not been established. Dr. Kung explained that such individuals were placed in a class zero for test findings according to Table 15-23 and not ratable by this section. He, therefore, concluded that appellant had no impairment rating pursuant to Table 15-23. In further support of his impairment determination, Dr. Kung related that, according to page 446, if test findings were normal or

nondiagnostic, the diagnosis class zero and the final impairment was class zero for nerve entrapment. He concluded that there was no objective evidence of impairment or residuals from appellant's accepted condition.

OWCP, in a November 26, 2019 decision, again denied appellant's claim for a schedule award. It found that the November 21, 2019 opinion of Dr. Kung as the IME represented the special weight of the evidence and established that she had no permanent impairment of the right upper extremity as a result of her accepted employment injury.

On December 2, 2019 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on March 10, 2020.

In an April 24, 2020 decision, an OWCP hearing representative affirmed the November 26, 2019 decision denying appellant's schedule award claim.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.[5]

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. However, FECA does not specify the manner in which the percentage of loss shall be determined. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

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 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]

[5] *See T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

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

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

[10] *Id*. at 411.

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

Impairment due to CTS is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[12] 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.[13]

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 IME) who shall make an examination.[14] 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.[15] 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.[16]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her right upper extremity, warranting a schedule award.

OWCP found a conflict in the medical opinion evidence between Dr. Allen, appellant's attending physician, who found that appellant had six percent permanent impairment of the right upper extremity due to her accepted right CTS, and Dr. Williams, an OWCP second physician, who found that she did not have right CTS and, thus, no permanent impairment. It properly referred her to Dr. Kung, pursuant to 5 U.S.C. § 8123(a), for an impartial medical examination in order to resolve the conflict in medical opinion.

In an August 3, 2018 report, Dr. Kung, the IME, discussed appellant's history of injury and reviewed her medical records. He provided normal examination findings and reported that there were no clinical findings of the accepted right carpal tunnel injury. Dr. Kung reasoned that the August 20, 2009 EMG of the right upper extremity was normal and the NCV study of even date was mildly abnormal. He further reasoned that appellant's symptoms, examination findings, and lack of improvement with splinting were completely inconsistent with a diagnosis of CTS.

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

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

[14] 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).

[15] 20 C.F.R. § 10.321.

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

Dr. Kung concluded that, since she did not have right CTS, he could not provide an impairment rating.

Upon OWCP's request, Dr. Kung provided a supplemental report dated November 21, 2019 acknowledging that appellant's claim was, in fact, accepted for right CTS and finding that she had no residuals or right upper extremity permanent impairment due to the accepted condition. He explained that, while the August 20, 2009 EMG/NCV studies diagnosed right CTS, the test results represented a class zero permanent impairment pursuant to Table 15-23 on page 449 of the sixth edition of the A.M.A., *Guides*. Additionally, Dr. Kung referenced page 446, which provided that, if test findings were normal or nondiagnostic, the diagnosis class zero and the final impairment was class zero for nerve entrapment.

As noted above, when a 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.[17] The Board finds that Dr. Kung's November 21, 2019 report is entitled to special weight and established that appellant had no right upper extremity permanent impairment.[18] Dr. Kung's opinion was based on a proper factual and medical history, which he reviewed, and on the appropriate tables and grading schemes of the A.M.A., *Guides*. He referenced Table 15-23 and page 446 and explained that appellant had no right upper extremity permanent impairment due to normal examination findings and essentially normal EMG/NCV studies. Accordingly, OWCP properly accorded special weight to Dr. Kung's November 21, 2019 report.[19]

The record contains no other probative, rationalized medical opinion which supports that appellant had a right upper extremity impairment based upon the A.M.A., *Guides*. As such, the Board finds that she has not met her burden of proof.

On appeal counsel contends that OWCP's April 24, 2020 decision is contrary to fact and law. He further contends that OWCP failed to adjudicate the claim in accordance with the proper standard of causation and to give due deference to the findings of appellant's attending physician. As explained above, appellant has not met her burden of proof to establish permanent impairment of her right upper extremity, warranting a schedule award.

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.

[17] *Id.*

[18] *See V.G.*, Docket No. 19-1728 (issued September 2, 2020); *H.K.*, Docket No. 18-0528 (issued November 1, 2019); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[19] *See V.G., id.*; *D.S.*, Docket No. 18-0336 (issued May 29, 2019); *T.C.*, Docket No. 17-1741 (issued October 9, 2018).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her right upper extremity, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 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