

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

---

**M.A., Appellant**

**and**

**U.S. POSTAL SERVICE, TRENTON CARRIER  
ANNEX, Trenton, NJ, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 13-300  
Issued: September 12, 2013**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 26, 2012 appellant, through his attorney, filed a timely appeal of an August 1, 2012 decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant established that he has greater than nine percent permanent impairment of the left arm for which he received a schedule award.

On appeal, appellant's counsel contends that OWCP erred in relying upon the opinion of OWCP's medical adviser instead of the opinion of the impartial medical examiner regarding appellant's impairment determination.

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. On May 11, 2011 the Board reversed OWCP's March 30, 2010 decision denying modification of a June 30, 2009 termination decision. The Board found that OWCP failed to meet its burden of proof in terminating appellant's medical benefits effective June 30, 2009. The Board found that the report of Dr. Andrew M. Hutter, a second opinion Board-certified orthopedic surgeon, did not address whether appellant had any residuals from the accepted conditions of partial tear of the left shoulder supraspinatus tendon and sprain of the left upper arm and shoulder. The Board found the second issue of whether appellant had any continuing residuals or disability after June 30, 2009 to be moot. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>2</sup>

On November 17, 2009 Dr. Nicholas Diamond, an osteopath, conducted a physical examination and reviewed the medical evidence. Based on his findings, he diagnosed post-traumatic left shoulder partial rotator cuff tear; post-traumatic cervical spine sprain and strain; left carpal tunnel syndrome and post-traumatic left shoulder myopathy. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Diamond found a 15 percent left upper extremity impairment. Using Table 15-34, page 475, he rated a three percent impairment for 165 degrees flexion, a three percent impairment for 160 degrees abduction and a one percent impairment for 75 degrees internal rotation, resulting in a seven percent impairment using Table 15-35, page 477. Next, Dr. Diamond determined that a *QuickDASH* score of 77 percent increased appellant's impairment to 10 percent using Table 15-36, page 477. After net adjustment, appellant's left upper extremity was eight percent. Dr. Diamond found that appellant had an eight percent impairment based on left median nerve entrapment based on Table 15-23, page 449. He combined the impairment ratings for range of motion deficit and left median nerve entrapment at the wrist to find a total 15 percent left upper extremity impairment.

On March 4, 2010 appellant filed a claim for a schedule award.

On April 21, 2010 Dr. Henry J. Maglioto, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed Dr. Diamond's report. He disagreed with the impairment rating by Dr. Diamond. Dr. Maglioto concluded that appellant had an eight percent left shoulder impairment using the sixth edition of the A.M.A., *Guides* using Tables 15-35, page 477 and Table 15-6, page 407. He opined that appellant was not entitled to an impairment rating for left median nerve entrapment as this was not an accepted condition.

On June 10, 2010 OWCP found a conflict in the medical opinion between Dr. Diamond, appellant's physician, and Dr. Maglioto, an OWCP medical adviser, on the extent of appellant's

---

<sup>2</sup> Docket No. 10-1911 (issued May 11, 2011). On October 22, 2008 appellant, then a 32-year-old rural carrier associate, filed a traumatic injury claim alleging that on that day he injured his shoulder when he fell as a result of a dog attack. OWCP accepted the claim for left shoulder contusion, cervical sprain and partial tear of the left shoulder supraspinatus tendon and sprain of the left shoulder and upper arm. Appellant did not stop work, but has worked limited duty since the injury.

left arm impairment. It referred appellant to Dr. James P. Taitsman, a Board-certified orthopedic surgeon, to resolve the conflict.

In a July 12, 2010 report, Dr. Taitsman reviewed a history of appellant's condition, detailed findings on examination and the case file. He concluded that appellant had a 10 percent left upper extremity impairment based on his carpal tunnel entrapment and left shoulder condition. Dr. Taitsman noted that he found no diminished range of motion so utilized the shoulder regional grid to determine impairment. Using Table 15-5, page 402, he assigned a class 1 for impingement syndrome. Dr. Taitsman assigned a grade modifier of 2 to Functional History (GMFH) and clinical examination using Tables 15-7 and 15-8, pages 406 and 408 and a grade modifier of one for Clinical Study (GMCS) adjustment using Table 15-9, page 411, resulting in a net adjustment of 2. He referred to Table 15-5 and that the grade C with modifier goes to grade E or a five percent impairment. Using Table 15-23, page 449, Dr. Taitsman found grade modifiers of 1 for test score, 2 for history and Physical Examination (GMPE) for 3 which resulted in a grade modifier of 2. He noted the functional status as mild which resulted in a total five percent impairment. Dr. Taitsman found a total 10 percent left upper extremity impairment based on combining the left arm and hand impairments.

On August 2, 2010 OWCP requested that its medical adviser review Dr. Taitman's report and provide an impairment rating. In a report dated August 5, 2010, Dr. Maglioto reviewed Dr. Taitman's report and concluded that appellant had only a nine percent left upper extremity impairment using Table 15-5, page 402.

By decision dated February 2, 2012, OWCP issued a schedule award for a nine percent impairment to the left upper extremity which ran for a period of 28.08 weeks of compensation from November 17, 2009 to June 1, 2010.

On February 9, 2012 counsel requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on May 16, 2012.

By decision dated August 1, 2012, OWCP's hearing representative affirmed the February 2, 2012 schedule award determination.

### **LEGAL PRECEDENT**

Under section 8107 of FECA<sup>3</sup> and section 10.404 of the implementing federal regulations<sup>4</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been

---

<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>5</sup>

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).<sup>6</sup> Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.<sup>7</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).<sup>8</sup>

Section 8123(a) of FECA<sup>9</sup> provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>10</sup> When 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 on a proper factual background, must be given special weight.<sup>11</sup> OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.<sup>12</sup>

### ANALYSIS

OWCP accepted that appellant sustained a left shoulder contusion, cervical sprain and partial tear of the left shoulder supraspinatus tendon and sprain of the left shoulder and upper arm as a result of the October 22, 2008 fall due to a dog attack. On November 17, 2009 Dr. Diamond, appellant's physician, concluded that appellant had a 15 percent left arm permanent impairment due to range of motion deficits and carpal tunnel syndrome. Dr. Maglioto, an OWCP medical adviser, reviewed Dr. Diamond's reports and concluded that appellant had an eight percent left arm impairment. OWCP properly referred appellant to Dr. Taitsman, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the percentage of permanent impairment pursuant to 5 U.S.C. § 8123(a).

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper

---

<sup>5</sup> *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed., 2009), page 3, section 1.3, ICF: A Contemporary Model of Disablement.

<sup>7</sup> *Id.* at 383-419.

<sup>8</sup> *Id.* at 411.

<sup>9</sup> 5 U.S.C. §§ 8101-8193

<sup>10</sup> *Id.* at § 8123(a); see *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>11</sup> *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>12</sup> *V.G.*, 59 ECAB 635 (2008); *Thomas J. Fragale*, 55 ECAB 619 (2004); see also *Richard R. LeMay*, 56 ECAB 341 (2005).

factual and medical background, must be given special weight.<sup>13</sup> OWCP procedures indicate that referral to OWCP's medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained.<sup>14</sup> Its procedures note that, after all necessary medical evidence is obtained, the case file must be routed to the medical adviser for an opinion concerning the nature and percentage of impairment.<sup>15</sup> However, cases returned from a referee medical examiner or an impartial medical specialist should not be routinely sent to an OWCP medical adviser unless a schedule award is at issue. Where a referee examination is arranged to resolve a conflict created between a claimant's physician and the medical adviser with respect to a schedule award issue, the same medical adviser should not review the referee specialist's report. Rather, another medical adviser or consultant should review the file.<sup>16</sup>

The Board notes that as the impartial medical examination was arranged to resolve a conflict created between Dr. Diamond and Dr. Maglioto with respect to appellant's left upper extremity impairment, it was improper for Dr. Maglioto, to subsequently review Dr. Taitsman's July 12, 2010 report. Rather, another OWCP medical adviser should have reviewed the impartial specialist's report.<sup>17</sup> In reviewing Dr. Taitsman's report, Dr. Maglioto stated that appellant was not entitled to an impairment rating for left median nerve entrapment as OWCP had not accepted this condition. In order to properly resolve the conflict created, however, it is up to the impartial medical specialist, Dr. Taitsman, to provide a reasoned opinion as to the extent of permanent impairment in accordance with the A.M.A., *Guides*. The medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.<sup>18</sup> Due to this procedure error, the case will be remanded to OWCP to have another OWCP medical adviser review Dr. Taitsman's July 12, 2010 report. If it is determined that Dr. Taitsman's opinion as to appellant's permanent impairment is in accordance with the A.M.A., *Guides*, then his July 12, 2010 report should be given the special weight of medical opinion. Should Dr. Taitsman's opinion require clarification, OWCP should request a supplemental opinion consistent with Board precedent.<sup>19</sup> Following such further development as is necessary, it shall issue a *de novo* merit decision on the schedule award issue.

---

<sup>13</sup> See *E.H.*, Docket No. 08-1862 (issued July 8, 2009); *I.J.*, 59 ECAB 408 Docket No. 07-2362 (issued March 11, 2008); *Roger Dingess*, 47 ECAB 123 (1995).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

<sup>15</sup> *Id.* at Chapter 2.810.8(d) (September 2010); see *John W. Slonaker*, 35 ECAB 997 (1984).

<sup>16</sup> *Id.* at Chapter 2.810.8(k); see *Richard R. LeMay*, *supra* note 12.

<sup>17</sup> See *John W. Slonaker*, *supra* note 15. See also *Carol J. Jackson*, 37 ECAB 641 (1986).

<sup>18</sup> See, e.g., *Willie C. Howard*, 55 ECAB 715 (2004) (where OWCP's medical adviser concurred that the impartial medical specialist's impairment rating was appropriate under the fifth edition of the A.M.A., *Guides*).

<sup>19</sup> See *Harry T. Mosier*, 49 ECAB 688, 693 (1998).

**CONCLUSION**

The Board finds that the case is not in posture for decision with respect to the schedule award determination as further development of the medical evidence is required.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 1, 2012 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: September 12, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board