

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

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B.T., Appellant)	
)	
and)	Docket No. 24-0736
)	Issued: August 23, 2024
U.S. POSTAL SERVICE, ELKINS PARK POST)	
OFFICE, Elkins Park, PA, Employer)	
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Appearances: *Case Submitted on the Record*
Michael D. Overman, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 28, 2024 appellant, through counsel, filed a timely appeal from a January 18, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 greater than six percent permanent impairment of each upper extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 26, 2012 appellant, then a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome and bilateral thumb arthritis due to factors of her federal employment including repetitive motion of the arms, hands, and wrists. OWCP accepted the claim for bilateral carpal tunnel syndrome.

Appellant submitted an April 4, 2013 report from Dr. Nicholas Diamond, an osteopathic physician specializing in family and pain medicine. He opined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*,⁴ appellant had 14 percent right upper extremity permanent impairment. The right upper extremity permanent impairment was based on right ulnar and median nerve entrapment neuropathy and a diagnosis of right wrist degenerative joint disease. For the left upper extremity, Dr. Diamond opined that appellant had 17 percent permanent impairment. The left upper extremity permanent impairment was based on left median nerve entrapment neuropathy, left shoulder range of motion (ROM) deficit, and left elbow bursitis.

On July 11, 2013 OWCP referred the case to district medical adviser (DMA), Dr. Arnold Berman, a Board-certified orthopedic surgeon. The SOAF noted appellant's previous claims for upper extremity injuries and the accepted conditions. In a report dated October 22, 2013, Dr. Berman opined that the only accepted condition was bilateral carpal tunnel syndrome, and that the schedule award must be limited to this condition. He opined that under Table 15-23 of the A.M.A., *Guides*, appellant had six percent permanent impairment of each upper extremity.

By decision dated November 22, 2013, OWCP issued a schedule award for six percent permanent impairment of each upper extremity. The period of the award was for 37.44 weeks and ran from April 4 to December 22, 2013.

On November 26, 2013 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on April 14, 2014.

By decision dated July 8, 2014, OWCP's hearing representative set aside the November 22, 2013 decision and remanded the case. She found that medical evidence from Dr. Diamond, was

³ Docket No. 16-1319 (issued April 25, 2017).

⁴ A.M.A., *Guides* 6th ed. 2009).

sufficient to warrant further development. OWCP's hearing representative directed OWCP to prepare a SOAF that included all the prior upper extremity claims and thereafter to refer the case to a DMA.⁵

In a supplemental report dated December 17, 2014, Dr. Berman opined that appellant had no additional permanent impairment of her upper extremities.

By decision dated December 19, 2014, OWCP denied an additional schedule award. It found that the weight of the medical evidence was represented by Dr. Berman.

Appellant, through counsel, on December 29, 2014 requested a hearing before an OWCP hearing representative.

By decision dated May 11, 2015, the hearing representative remanded the case for further development. She indicated that all prior accepted conditions to the upper extremities should be considered, and the case should be referred to an appropriate Board-certified specialist.

OWCP prepared a SOAF dated July 1, 2015. It found that there was a conflict in the medical evidence between Dr. Diamond and OWCP's medical adviser, Dr. Berman. OWCP selected Dr. Menachem Meller, a Board-certified orthopedic surgeon, to perform an impartial medical evaluation.

In a report dated September 27, 2015, Dr. Meller reviewed appellant's medical history and results on physical examination. He reported "functional" motion of the shoulder, elbow, wrist, and hand. Dr. Meller noted that appellant had neck and nerve-type complaints in the upper extremities with a history of polyneuropathy. He opined that the impairments treated by Dr. Diamond "other than the bilateral carpal tunnel syndrome would not be reasonable or apportioned through the work injuries accepted." Dr. Meller found that with respect to appellant's bilateral carpal tunnel syndrome, under Table 15-23 of the A.M.A., *Guides* this condition resulted in six percent permanent impairment of each upper extremity.

By decision dated October 22, 2015, OWCP denied an additional schedule award for the upper extremities. It found the special weight rested with the impartial medical examiner (IME), Dr. Meller.

On October 26, 2015 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on February 3, 2016.

⁵ A statement of accepted facts (SOAF) dated April 9, 2012 identified two prior claims: a February 8, 2010 injury accepted for left elbow and shoulder contusions, and aggravation of spondylosis (OWCP File No. xxxxxx858), and a December 30, 2010 injury accepted for cervical and lumbar sprains (OWCP File No. xxxxxx952). Appellant also has two additional prior claims: a January 22, 1996 injury accepted for cervical sprain, (OWCP File No. xxxxxx971), and a December 5, 2008 claim accepted for temporary aggravation of cervical degenerative disc disease, and foraminal stenosis, (OWCP File xxxxxx132). OWCP has not administratively combined these claims with the current claim, OWCP File No. xxxxxx710.

Appellant submitted a February 23, 2016 report from Dr. Diamond who opined that appellant did have a history of cervical radiculopathy that should be incorporated in a permanent impairment evaluation. He opined that appellant had 9 percent right arm permanent impairment based on entrapment neuropathy, 14 percent left upper extremity permanent impairment based on entrapment neuropathy, and left bicep motor strength deficit.

By decision dated March 7, 2016, OWCP's hearing representative affirmed the October 22, 2015 decision. He found that Dr. Meller had resolved the conflict in the medical evidence and represented the special weight of the medical evidence.

Appellant, through counsel, appealed to the Board. By decision dated April 25, 2017, the Board set aside the March 7, 2016 decision and remanded the case for further development, finding that there was an unresolved conflict of medical opinion between Dr. Diamond and Dr. Meller.⁶

In compliance with the Board's decision, OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a report dated May 24, 2023, Dr. Askin reviewed appellant's extensive medical history, the SOAF, and conducted a physical examination. He related that appellant had carried the carpal tunnel diagnosis for many years and had chosen not to have it addressed. Appellant's condition was therefore not truly severe, or limiting, or intolerable. Dr. Askin observed no objective physical findings on examination, noting no features of denervation change of either hand, no atrophy of either hand, and functional sensibility. He further noted that electrodiagnostic studies had indicated imperfections consistent with carpal tunnel syndrome. Dr. Askin stated that he was unable to confirm any grade modifiers should be applied under Table 15-23 on page 449 of the sixth edition of the A.M.A., *Guides* as her objective physical findings were nonexistent. He opined that she did not have more than two percent permanent impairment of the upper extremities. Dr. Askin noted that he was unable to confirm Dr. Diamond's impairment ratings.

By decision dated July 14, 2023, OWCP denied an additional schedule award, based upon Dr. Askin's May 24, 2024 IME report.

On July 25, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on November 3, 2023.

By decision dated January 18, 2024, OWCP's hearing representative affirmed the July 14, 2023 decision.

⁶ *Supra* note 3.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ 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 loss of a member shall be determined. The method used in making such a 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 2009.⁹

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): A Contemporary Model of Disablement*.¹⁰ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by the grade modifier for functional history (GMFH), the grade modifier for physical examination (GMPE), and the grade modifier for clinical studies (GMCS).¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.¹³

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.¹⁴

Section 8123(a) of FECA provides in pertinent part that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the

⁷ *Supra* note 2.

⁸ 20 C.F.R. § 10.404.

⁹ 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 Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

¹¹ *Id.* at 383-492.

¹² *Id.* at 411.

¹³ *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁴ *A.C.*, Docket No. 19-1333 (issued January 8, 2020); *B.B.*, Docket No. 18-0782 (issued January 11, 2019); *supra* note 9 at Chapter 2.808.6(f) (March 2017).

Secretary shall appoint a third physician who shall make an examination.¹⁵ 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.¹⁶ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹⁷

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than six percent permanent impairment of each upper extremity, for which she previously received schedule award compensation.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA. It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's March 7, 2016 decision, as the Board considered that evidence in its April 25, 2017 decision.¹⁸

Following the Board's prior remand for an impartial medical evaluation, OWCP referred appellant to Dr. Askin. In a report dated May 24, 2023, Dr. Askin, serving as the IME, reviewed appellant's medical history, an SOAF, and results on physical examination. He observed no objective physical findings on examination, noting no features of denervation change of either hand, no atrophy of either hand, and functional sensibility. Dr. Askin further noted that electrodiagnostic studies had indicated imperfections consistent with carpal tunnel syndrome. However, he concluded that as appellant had no objective physical examination findings, he was unable to confirm any grade modifiers under Table 15-23 on page 449 of the sixth edition of the A.M.A., *Guides*. Dr. Askin opined that appellant did not have more than two percent permanent impairment of the upper extremities.

The Board finds that the opinion of Dr. Askin constitutes the special weight of the medical evidence and is sufficient to establish that appellant has no greater impairment than previously awarded.

The Board finds that appellant has not established that she has greater than six percent permanent impairment of each upper extremity, for which she previously received schedule award compensation.

¹⁵ 5 U.S.C. § 8123(a); *J.K.*, Docket No. 20-0907 (issued February 12, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹⁶ 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

¹⁷ See *J.K.*, *supra* note 15; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁸ See *A.P.*, Docket No. 24-0348 (issued June 7, 2024); *M.S.*, Docket No. 20-1095 (issued March 29, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

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 her burden of proof to establish that she has greater than six percent permanent impairment of each upper extremity, for which she previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board