

shoulder. Appellant received wage-loss compensation. Effective July 20, 2004, OWCP terminated all further benefits on the basis that her accepted sprains had resolved.²

By decision dated March 23, 2011, appellant received a schedule award for eight percent impairment of the right upper extremity (RUE).³ OWCP based the award on the March 14, 2011 findings of its district medical adviser (DMA), Dr. Christopher R. Brigham, who calculated impairment due to loss of shoulder range of motion (ROM) under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).⁴

In a June 6, 2011 decision, the Branch of Hearings & Review set aside the March 23, 2011 schedule award. OWCP had referred appellant to an impartial medical examiner to resolve a conflict in medical opinion regarding her entitlement to a schedule award.⁵ The impartial medical examiner, Dr. David R. Pashman, found 13 percent RUE impairment. When the DMA reviewed the record, he was unable to determine how Dr. Pashman arrived at his 13 percent RUE rating under the A.M.A., *Guides* (6th ed. 2008). The DMA also disagreed with the impartial medical examiner's January 21, 2011 finding of cervical (C4-5) radiculopathy. Because of perceived deficiencies in the impartial medical examiner's opinion, the DMA based his eight percent RUE rating on the July 20, 2010 right shoulder ROM measurements provided by appellant's physician, Dr. Diamond.

In setting aside OWCP's March 23, 2011 schedule award, the hearing representative explained that the DMA could not resolve a conflict in medical opinion, and given the noted deficiencies in the impartial medical examiner's report, OWCP should have sought clarification from Dr. Pashman. The hearing representative further found that the impartial medical examiner's report did not address whether the current RUE impairment was causally related to appellant's April 29, 2002 employment injury. Consequently, the case was remanded to OWCP for further medical development.

On remand, OWCP sought clarification from Dr. Pashman. In a June 10, 2010 supplemental report, the impartial medical examiner attributed appellant's current right upper extremity impairment to both preexisting degenerative disease and her April 29, 2002

² OWCP based its decision to terminate wage-loss compensation and medical benefits on the March 30 and May 25, 2004 findings of Dr. Richard J. Mandel, a Board-certified orthopedic surgeon and impartial medical examiner, who concluded that appellant fully recovered from her accepted injury.

³ The award covered a period of 24.96 weeks from July 20, 2010 to January 10, 2011.

⁴ Table 15-34, Shoulder ROM, A.M.A., *Guides* 475 (6th ed. 2008).

⁵ In a report dated July 20, 2010, appellant's physician, Dr. Nicholas P. Diamond, found 21 percent RUE impairment under the A.M.A., *Guides* (6th ed. 2008). Dr. Diamond based his overall rating on a combination of impairments due to shoulder ROM (eight percent), sensory deficit at C5 nerve root (one percent), and motor/strength deficits involving the right biceps (five percent) and right triceps (nine percent). The DMA, Dr. Arnold T. Berman, reviewed Dr. Diamond's July 20, 2010 impairment rating and disagreed. In a November 7, 2010 report, Dr. Berman found 11 percent RUE impairment. While he agreed with Dr. Diamond that there was eight percent impairment due to right shoulder ROM deficits, the DMA only found an additional three percent RUE impairment based on pain and sensory complaints involving the C5, C6 and C7 nerve roots. OWCP declared a conflict based on the differing opinions of Dr. Diamond and Dr. Berman (DMA).

employment injury. He also explained that in addition to loss of shoulder motion, there was neuropathic pain and mild nerve root irritation. These later components were considered more functionally limiting than appellant's decreased shoulder ROM. Although he explained the various components of his impairment rating, the impartial medical examiner did not otherwise identify which aspect(s) of the A.M.A., *Guides* (6th ed. 2008) supported his 13 percent RUE impairment.

After reviewing the impartial medical examiner's supplemental report, Dr. Brigham, the DMA, reaffirmed his prior finding of eight percent RUE impairment based on shoulder ROM deficits. The DMA further noted that there was no evidence of sensory or motor deficits that might otherwise support a neurologic rating of 13 percent RUE impairment. According to Dr. Brigham, the impartial medical examiner relied upon outdated diagnostic studies in finding cervical radiculopathy instead of properly relying on current physical examination findings.

OWCP issued a July 5, 2011 decision denying an increased schedule award. The decision stated that both the impartial medical examiner and DMA "concur" that appellant had eight percent impairment of the RUE. Because she had already received an award for eight percent, OWCP found that appellant was not entitled to an additional schedule award.

By decision dated April 10, 2012, the Branch of Hearings & Review set aside the July 5, 2011 decision. The hearing representative ordered OWCP to refer appellant for another impartial medical evaluation.

In a June 15, 2012 report, Dr. William H. Spellman, a Board-certified orthopedic surgeon and impartial medical examiner, indicated there was no medical basis for finding that appellant had greater than eight percent impairment of her RUE. With respect to right shoulder ROM, Dr. Spellman observed "un-physiologic behavior." He noted that, although there was no impingement or capsular tightness evident, appellant actively resisted forward flexion at 75 degrees. Because of her resistance, Dr. Spellman did not attempt to have appellant forward flex her shoulder in abduction beyond this point. He explained that Dr. Diamond's July 20, 2010 right shoulder ROM measurements were most favorable to appellant (eight percent RUE), and because of her current "un-physiologic behavior" it could not be determined whether she would have exceeded Dr. Diamond's prior ROM observations. The remainder of the impartial medical examiner's physical examination regarding appellant's right shoulder and upper extremity was reportedly unremarkable. There were no atrophic changes present and proximal and distal motor strength was grossly full.

The impartial medical examiner also stated that appellant's physical examination was inconsistent with a cervical radiculopathy. Appellant reportedly exhibited a disproportionate pain response to light, but obvious and deliberate palpation of the right trapezia. When the impartial medical examiner applied more vigorous palpation of the same area, but in an unobvious fashion, the previously observed pain behavior was notably absent. The impartial medical examiner also explained that appellant's complaint of paresthesias in all fingers of her right hand was nonanatomic and inconsistent with a 2003 electrodiagnostic study that reportedly revealed C4-5 nerve root irritation. He also reported that there was no sensory loss detected on physical examination or any other observed changes to the hands consistent with a neuropathic process. Additionally, the impartial medical examiner noted inconsistencies with respect to

ROM of the neck. When she was asked to demonstrate ROM of her neck, appellant reported pain at five degrees of right or left lateral rotation. However, the impartial medical examiner observed 50 degrees of right or left lateral rotation as appropriate to maintain eye contact during the interview and during other parts of the examination. Additionally, the impartial medical examiner commented that root tension signs were absent and deep tendon reflexes were symmetrically normal. Based on his evaluation, the impartial medical examiner concluded there was no basis for a finding of cervical radiculopathy or other neuropathic process affecting appellant's RUE.

Having accepted Dr. Diamond's July 2010 eight percent shoulder ROM impairment rating, the impartial medical examiner found no medical basis for concluding that appellant had a greater permanent impairment of her RUE.

Dr. Morley Slutsky, a medical adviser, reviewed the impartial medical examiner's June 15, 2012 report and found one percent RUE impairment. The DMA's July 24, 2012 impairment rating was based on a diagnosis of shoulder sprain under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 401 (6th ed. 2008).

In a July 30, 2012 decision, OWCP found that appellant was not entitled to an additional schedule award based on the latest reports from the impartial medical examiner and DMA.

Appellant requested a hearing which was held on November 28, 2012.

OWCP received the results of a June 11, 2012 cervical magnetic resonance imaging (MRI) scan which revealed, *inter alia*, no stenosis and a normal cervical cord throughout.

In a November 23, 2012 supplemental report, Dr. Diamond noted that he had reviewed both the impartial medical examiner's report and the DMA's findings. He criticized the impartial medical examiner's findings with respect to upper extremity motor strength and sensation to light touch, noting that it was unclear what type of testing had been administered. Dr. Diamond stated that, based on his July 20, 2010 evaluation, appellant had a total combined RUE impairment of 20 percent.

By decision dated February 19, 2013, the hearing representative affirmed OWCP's July 30, 2012 decision denying an additional schedule award.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁶ FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for

⁶ For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

evaluating schedule losses.⁷ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁸

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.⁹ For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁰ Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹¹

ANALYSIS

OWCP properly declared a conflict in medical opinion between appellant's physician, Dr. Diamond, who found 21 percent RUE impairment, and the DMA, Dr. Berman, who only found 11 percent impairment. The two physicians concurred regarding appellant's eight percent impairment due to shoulder ROM deficits, but disagreed about the extent of impairment due to cervical-related upper extremity sensory and/or motor deficits. After referring appellant to an impartial medical examiner, OWCP granted a schedule award for eight percent RUE impairment. However, the March 23, 2011 schedule award was not based on the January 21, 2011 findings of Dr. Pashman, the impartial medical examiner. OWCP relied instead on the March 14, 2011 impairment rating of then DMA Dr. Brigham, which was primarily based on Dr. Diamond's July 20, 2010 right shoulder ROM measurements. The Branch of Hearings & Review appropriately set aside the March 23, 2011 schedule award because OWCP supplanted the impartial medical examiner's opinion.¹²

⁷ 20 C.F.R. § 10.404 (2012).

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

⁹ 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321 (2012); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

¹⁰ *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹¹ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹² While the DMA may review the opinion of a referee specialist in a schedule award case, the resolution of the conflict is the specialist's responsibility. The DMA cannot resolve a conflict in medical opinion. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing & Evaluating Medical Evidence*, Chapter 2.810.8k (September 2010).

After two remands, OWCP ultimately referred appellant to Dr. Spellman for an impartial medical evaluation.¹³

Dr. Spellman's June 15, 2012 physical examination revealed "un-physiologic behavior" during right shoulder active ROM testing. He observed appellant's resistance in forward flexion at 75 degrees absent evidence of impingement or capsular tightness. As such, the impartial medical examiner curtailed his right shoulder ROM examination. Dr. Spellman explained that, because of appellant's un-physiologic behavior, he was unable to determine if her right shoulder ROM would have exceeded what Dr. Diamond observed in July 2010. The remainder of appellant's right shoulder physical examination was unremarkable. Dr. Spellman commented that there was no evidence of atrophy and no loss of motor strength.

Dr. Spellman also addressed whether there were any neck/cervical conditions affecting appellant's RUE. He noted that her physical examination was inconsistent with a cervical radiculopathy. The impartial medical examiner also questioned appellant's pain response on light palpation of the right shoulder area, as well as her complaints of paresthesias in all fingers of the right hand. This latter complaint he characterized as nonanatomic. Lastly, the impartial medical examiner observed questionable limitations regarding neck ROM. When asked to demonstrate her neck ROM, appellant reported pain at five degrees of right/left lateral rotation. However, during other aspects of the examination, the impartial medical examiner observed 50 degrees of right/left lateral rotation. Based on his examination and review of the record, the impartial medical examiner indicated that there was no basis for finding a cervical radiculopathy or other neuropathic process affecting appellant's RUE.

Dr. Spellman concluded that there was no medical basis for finding that appellant currently had a greater impairment than the eight percent RUE impairment derived from Dr. Diamond's July 2010 assessment of her shoulder ROM. When a case is referred to an impartial medical examiner to resolve a conflict, the resulting medical opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴ The Board finds that OWCP properly deferred to Dr. Spellman's June 15, 2012 findings. The impartial medical examiner provided a well-reasoned report based on a proper factual and medical history. He also accurately summarized the relevant medical evidence. Additionally,

¹³ On appeal, counsel "suggested" that Dr. Spellman was not properly selected as impartial medical examiner because of the absence of screen shot images. To the contrary, the current record includes a screen shot and a ME023 - Appointment Schedule Notification which confirm Dr. Spellman's selection as impartial medical examiner pursuant to OWCP's Medical Management (MM) application. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5 (May 2013); *R.C.*, Docket No. 12-468 (issued October 5, 2012). Additionally, the record includes screen shots of several physicians who were bypassed by OWCP before selecting Dr. Spellman. These screen shots identify the physician by name and the reason he/she was bypassed. For example, Dr. Pashman was one of eight physicians bypassed. The reason OWCP bypassed him was because "Claimant saw this Dr." Seven other physicians were bypassed for various reasons, including incomplete information regarding current telephone number/location, the physician(s) did not do impairment ratings, and the physician(s) had not returned OWCP's calls.

¹⁴ *Gary R. Sieber, supra* note 11.

Dr. Spellman provided a thorough examination. His June 15, 2012 report included detailed findings and medical rationale supporting his opinion. As the impartial medical examiner, Dr. Spellman's opinion was entitled to determinative weight.¹⁵ Accordingly, the Board finds that OWCP properly relied on Dr. Spellman's June 15, 2012 findings in determining that appellant did not have right upper extremity impairment in excess of the eight percent previously awarded.

In his latest report dated November 23, 2012, Dr. Diamond offered no additional insight or support for his RUE impairment rating. In fact, this latest report found 20 percent combined RUE impairment, whereas Dr. Diamond previously found 21 percent impairment. Subsequent reports from a physician who was on one side of a medical conflict that has since been resolved would generally be insufficient to overcome the weight accorded the impartial medical examiner's report and/or insufficient to create a new medical conflict.¹⁶ Dr. Diamond's November 23, 2012 follow-up report is insufficient to overcome the weight properly accorded Dr. Spellman's June 15, 2012 opinion and is similarly insufficient to create a new conflict in medical opinion.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

Appellant failed to establish that she has greater than eight percent impairment of the RUE.

¹⁵ *Id.*

¹⁶ *I.J.*, 59 ECAB 408, 414 (2008).

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board