

FACTUAL HISTORY

This case has previously been before the Board. By decision issued July 10, 2003,¹ the Board set aside a November 12, 2002 schedule award decision, finding a conflict of medical opinion between Dr. Ronald J. Potash, an attending physician, and an Office medical adviser. The Board remanded the case for an impartial medical examination. The law and facts of the case as set forth in the Board's prior decision are incorporated by reference.

On remand, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Peter Barcas, an osteopathic physician, for an impartial medical examination and impairment rating. Appellant submitted a December 23, 2003 report, which did not reference the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter, A.M.A., *Guides*), fifth edition. An Office medical adviser reviewed Dr. Barcas' findings and calculated an 11 percent impairment of each upper extremity.

By decision dated January 24, 2004, the Office found that appellant had an 11 percent permanent impairment of each upper extremity. As appellant had already received a schedule award for a 10 percent impairment of each upper extremity, the Office awarded an additional 1 percent impairment of each upper extremity.

Appellant requested a hearing, held on October 20, 2004. At the hearing, she asserted that Dr. Barcas' opinion was insufficiently rationalized to represent the weight of the medical evidence. Following the hearing, appellant submitted a November 16, 2004 report from Dr. David Weiss, an osteopathic physician, finding that she had a 36 percent impairment of each upper extremity according to the A.M.A., *Guides*.

By decision dated January 19, 2005, an Office hearing representative remanded the case to obtain a supplemental report from Dr. Barcas. However, Dr. Barcas was unable to provide a report, as requested.

In September 2005, the Office utilized its Physicians Directory System (PDS) in an attempt to find a new impartial medical examiner. This search was unsuccessful as there were few qualified specialists in appellant's commuting area.² The Office then consulted a medical referral broker, who recommended Dr. Charles B. Thomas, Jr., a Board-certified orthopedic surgeon, with a practice located within traveling distance of appellant's residence.

The Office referred appellant, the medical record and a statement of accepted facts to Dr. Thomas. In an October 17, 2005 report, Dr. Thomas advised that appellant had no objective signs of carpal tunnel syndrome and had no impairment of the upper extremities according to the A.M.A., *Guides*.

By decision dated December 7, 2005, the Office denied appellant's claim for an additional schedule award on the grounds that the medical evidence did not establish an

¹ Docket No. 03-872 (issued July 10, 2003).

² In 2004, appellant relocated from New Jersey to Camden, South Carolina.

increased percentage of permanent impairment. It accorded the weight of the medical evidence to Dr. Thomas.

Appellant requested a hearing, held on March 21, 2006. In an April 4, 2006 letter, counsel asserted that Dr. Thomas could not serve as an impartial medical examiner as he was selected by a broker, in violation of the Office's procedures. He also contended that Dr. Thomas' opinion was poorly rationalized and based on an incomplete medical record.

By decision dated May 23, 2006, an Office hearing representative found that Dr. Thomas was not properly selected using the PDS. The hearing representative remanded the case to the Office for selection of a new impartial medical examiner. The Office noted that Dr. Thomas' opinion would be considered that of a second opinion physician.

The Office referred appellant to Dr. Timothy R. Wagner, M.D., a Board-certified orthopedic surgeon, using the PDS. In an April 12, 2007 report, Dr. Wagner provided a history of injury and treatment and reviewed the medical record. He obtained grip strength measurements of 18, 12 and 12 kilograms (kg) on the right and 8, 8 and 7 kg on the left. On examination, Dr. Wagner found 5/5 strength in all upper extremity muscle groups bilaterally, full range of motion of the hands, wrists and fingers, no atrophy, negative Tinel's sign and positive Phalen's test bilaterally with tingling in the fingertips of the index and long fingers of the right hand and the left thumb and index finger. He opined that, as appellant elected not to have carpal tunnel release surgery, she should be considered as someone who underwent surgery and still had pain after an optimal recovery time. Dr. Wagner stated that, based on page 495 of the A.M.A., *Guides*, appellant had a five percent impairment of each upper extremity. He also noted a six percent impairment of the whole person due to numbness and tingling in the fingertips. Dr. Wagner found that appellant reached maximum medical improvement in 1997 when she declined carpal tunnel release. He commented that appellant had a motive for secondary gain.

In a May 10, 2007 report, an Office medical adviser reviewed Dr. Wagner's report. He opined that Dr. Wagner's findings did not support a five percent impairment of each upper extremity. The medical adviser found that Dr. Wagner misapplied scenario 2, page 495 of the A.M.A., *Guides*, as there was no objective opposition weakness on examination. He stated that Dr. Wagner improperly assessed whole person impairments for subjective fingertip numbness. The medical adviser concluded that the five percent impairments were based only on subjective complaints.

By decision dated May 16, 2007, the Office denied appellant's claim for an additional schedule award. It found that Dr. Wagner's findings, as interpreted by the Office medical adviser, did not support more than the 11 percent impairment of each upper extremity previously awarded.

Appellant requested an oral hearing, held on September 25, 2007. At the hearing, she asserted that Dr. Wagner misapplied the A.M.A., *Guides* and that the Office medical adviser misinterpreted Dr. Wagner's findings. Appellant also contended that the Office should have excluded Dr. Thomas' report from the record as he had been improperly selected.

By decision dated and finalized November 13, 2007, an Office hearing representative affirmed the May 16, 2007 decision. The hearing representative found that Dr. Wagner's report properly utilized the A.M.A., *Guides* and did not support a greater percentage of permanent impairment than that already awarded. The hearing representative further found that the Office was not required to exclude Dr. Thomas' report as there was no evidence the Office improperly influenced his opinion.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act³ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. 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. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁴ As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.⁵

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.⁶ Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.⁷

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome. The Board previously found a conflict of medical evidence regarding the appropriate percentage of permanent impairment between Dr. Potash, for appellant, and an Office medical adviser. On remand, of the case, the Office initially selected Dr. Barcas, an osteopathic physician, as impartial medical examiner. Based on Dr. Barcas' opinion, the Office awarded appellant a schedule award for an 11 percent impairment of each upper extremity. However, the Office subsequently found Dr. Barcas' opinion insufficiently rationalized to represent the weight of the

³ 5 U.S.C. §§ 8101-8193.

⁴ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ A.M.A. *Guides*, Chapter 16, "The Upper Extremities," pp. 433-521 (5th ed. 2001).

medical evidence. It then obtained a report from Dr. Thomas, who was subsequently disqualified from serving as impartial medical examiner as he was not selected according to the PDS.

The Office selected Dr. Wagner, a Board-certified orthopedic surgeon, as the impartial medical examiner, who submitted an April 12, 2007 report finding a five percent impairment of each upper extremity due to strength deficit and a six percent whole person impairment due to subjective fingertip tingling. An Office medical adviser opined that Dr. Wagner misapplied the A.M.A., *Guides* and failed to justify his impairment rating. The Board has held that, while an Office medical adviser may review the opinion of an impartial medical specialist in a schedule award case, the resolution of the conflict is the specialist's responsibility.⁸ Yet, the Office based its May 16 and November 13, 2007 decisions on the Office medical adviser's opinion, without attempting to obtain a supplemental report from Dr. Wagner.

Since the Office undertook to obtain an impartial medical specialist's opinion, it is obligated to obtain a sufficiently reasoned report as to the appropriate percentage of permanent impairment to appellant's upper extremities.⁹ The Board will remand the case for a supplemental report from Dr. Wagner on this issue. Following this and such development deemed necessary, the Office shall issue an appropriate decision.

On appeal, appellant contends that the Office erred by failing to exclude the report of Dr. Thomas from the record as he was improperly selected. The Office's procedures require excluding a medical report from the record if leading questions were posed to a second opinion or impartial physician.¹⁰ There is no evidence of record and appellant does not contend, that the Office posed improper questions to Dr. Thomas. Therefore, the Board finds that the Office did not err by retaining the report in the record as that of a second opinion physician.

CONCLUSION

The Board finds that the case is not in posture for a decision. The case will be remanded to the Office for further development.

⁸ See, e.g., *Willie C. Howard*, 55 ECAB 564 (2004) (where the Office medical adviser concurred that the impartial medical specialist's impairment rating was appropriate under the fifth edition of the A.M.A., *Guides*).

⁹ See, e.g., *Elmer K. Kroggel*, 47 ECAB 557 (1996) (the Board remanded the case for the Office to obtain a supplemental report from the impartial medical specialist).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6(d) (September 1995). See also Chapter 2.810.13. *Brenda C. McQuiston*, 54 ECAB 816 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2007 is set aside and the case remanded for further development consistent with this decision.

Issued: April 1, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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