

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

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**A.M., Appellant**

**and**

**SMITHSONIAN INSTITUTION, NATIONAL  
ZOO, Washington, DC, Employer**

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**Docket No. 12-1217  
Issued: December 27, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 15, 2012 appellant filed a timely appeal from a November 15, 2011 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 has established that she is entitled to greater than 21 percent impairment of the right upper extremity, for which she received a schedule award.

On appeal, appellant contends that OWCP erred in relying upon the opinion of OWCP's medical adviser in calculating her impairment rating for her schedule award.

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

## **FACTUAL HISTORY**

This case has previously been before the Board. In an April 17, 2012 decision, the Board reversed a February 8, 2011 OWCP hearing representative's decision which affirmed a September 21, 2010 OWCP decision reducing her wage-loss compensation. The Board found that the medical evidence of record did not clearly and unequivocally establish that appellant could perform the duties of the selected position of file clerk. Thus, the Board found that OWCP did not meet its burden of proof in reducing appellant's wage-loss compensation benefits effective July 3, 2011. The facts and circumstances of the Board's prior decision are incorporated by reference.<sup>2</sup> The relevant facts are set forth below.

On July 29, 2010 appellant filed a claim for a schedule award.

Appellant submitted a June 9, 2009 report from Dr. Scott G. Edwards, a Board-certified orthopedic surgeon, in support of her schedule award claim. Dr. Edwards concluded that she had a 28 percent right upper extremity based on her right wrist and thumb range of motion using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

By decision dated March 1, 2011, OWCP denied appellant's request for a schedule award. It found the evidence insufficient to establish a permanent impairment to a scheduled member.

In a March 11, 2011 report, Dr. Robert H. Wilson, a treating physician, concluded that appellant had a 30 percent right upper extremity permanent impairment using the sixth edition of the A.M.A., *Guides*. He stated that the impairment calculation was based on peripheral nerve impairment, limitation of range of motion for her fingers and diagnosis-based impairment. Dr. Wilson found appellant's muscle tendon injury was a class one with a grade modifier of one for Functional History (GMFH), two for Physical Examination (GMPE) and three for Clinical Studies (GMCS) which resulted in a grade E or seven percent impairment. Using Table 15-21, he assigned a class 2 for sensory impairment, a one for functional history adjustment and three for clinical studies adjustment. Based on these findings, Dr. Wilson found a grade C or 17 percent impairment for sensory median nerve impairment. Next he assigned a class 1 for motor impairment with a one for functional history adjustment and three for clinical studies adjustment. This resulted in a grade C or six percent motor nerve impairment. Dr. Wilson then combined the motor and sensory impairments which resulted in a 22 percent peripheral nerve/entrapment impairment. Lastly, he combined the 7 percent diagnosis-based impairment with the 22 percent peripheral nerve impairment which resulted in a total 30 percent right upper extremity impairment.

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<sup>2</sup> On October 18, 2007 appellant, then a 55-year-old animal keeper, filed a traumatic injury claim alleging that on that day she sustained a deep bite wound in her right wrist and forearm when she was bitten by a howler monkey. OWCP accepted the claim for right wrist laceration with tendon involvement, which was expanded to include right wrist and hand tenosynovitis and right median nerve lesions. Appellant returned to light-duty full-time work on March 17, 2008. On May 28, 2009 OWCP placed her on the periodic rolls for temporary total disability as the employing establishment could no longer accommodate her light-duty restrictions. Appellant opted to receive disability retirement benefits from the Office of Personnel Management (OPM) over FECA effective April 24, 2010.

In a June 14, 2011 report, Dr. Christopher R. Brigham, OWCP's medical adviser who is Board-certified in family and occupational medicine, noted his review of the medical record including the March 11, 2011 impairment evaluation by Dr. Wilson. He noted that the accepted conditions indicated that appellant had a ratable impairment for right open wound of wrist tendon, right hand and wrist tenosynovitis and right medial nerve lesions. Dr. Brigham concluded that she had a 17 percent median nerve impairment and a 5 percent wrist tendon impairment, resulting in a total 21 percent right upper extremity impairment. For the peripheral nerve injury, he found a functional history grade modifier of one, a grade modifier for physical examination was not applicable and a grade modifier of two for clinical studies. Based on these determinations, Dr. Brigham found a 14 percent sensory impairment and 4 percent motor impairment, which resulted in a 17 percent impairment rating pursuant to Table 15-21. Using Table 15-3, he found a class 1 impairment for wrist tendon laceration which had a default impairment of five percent. Dr. Brigham disagreed with Dr. Wilson as to the grade modifier for physical examination and clinical studies, but agreed with the grade modifier of one for functional history. Using the grade modifier for functional history, he determined there was no net adjustment for the class so the impairment rating remained at the default of five percent. Lastly, Dr. Brigham combined the 5 percent impairment rating for the wrist tendon injury with the 17 percent median nerve impairment, for a total 21 percent right upper extremity impairment.

By an August 5, 2011 decision, OWCP vacated its March 11, 2011 decision and accepted that appellant sustained a 21 percent employment-related impairment.

On November 15, 2011 OWCP granted appellant a schedule award for 21 percent right upper extremity impairment. The award ran for 65.52 weeks for the period March 11, 2011 to June 11, 2012.

### **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 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

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<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.

and GMCS.<sup>7</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>8</sup>

Section 8123(a) of FECA provides in pertinent part: “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>9</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>10</sup>

### ANALYSIS

OWCP accepted appellant’s claim for right wrist laceration with tendon involvement, which was expanded to include right wrist and hand tenosynovitis and right median nerve lesions. It granted her a schedule award for a 21 percent right upper extremity impairment based on the opinion of Dr. Brigham, an OWCP medical adviser.<sup>11</sup>

The Board finds, however, that there is a conflict between Dr. Brigham and Dr. Wilson, a treating physician, with regards to the extent of permanent impairment attributable to appellant’s employment-related injury. Both physicians agree that the default value is five pursuant to Table 15-3. Both also agree that appellant has a grade modifier of one for functional history. However, Dr. Wilson opined that she was entitled to a grade modifier of two for physical examination and a grade modifier of three for clinical studies whereas Dr. Brigham determined that appellant was entitled to a grade modifier of zero for clinical studies and physical examination. This difference is significant in that using his conclusion of grade modifiers for clinical studies and physical examination would move the impairment rating up to a grade E or impairment of seven percent. Utilizing Dr. Brigham’s conclusion that appellant was entitled to a zero for clinical studies and physical examination and one for functional history, the rating remains at the default rating and would result in an impairment of five percent under Table 15-3 for a wrist laceration. In addition, using Table 15-21, Dr. Wilson determined that appellant had a total 22 percent sensory and motor nerve impairment while Dr. Brigham concluded there was only a 17 percent sensory and motor nerve impairment. Therefore, there is an unresolved conflict between appellant’s treating physician, Dr. Wilson, and Dr. Brigham, an OWCP medical adviser, with regards to the proper impairment rating based on appellant’s right wrist laceration with tendon involvement, right wrist and hand tenosynovitis and right median nerve lesions.

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

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

<sup>9</sup> 5 U.S.C. § 8123(a); *see T.C.*, Docket No. 08-2112 (issued June 12, 2009).

<sup>10</sup> *J.J.*, Docket No. 09-27 (issued February 10, 2009); *William C. Bush*, 40 ECAB 1064 (1989).

<sup>11</sup> The record contains a June 9, 2009 report from Dr. Edwards, a Board-certified orthopedic surgeon, who found a 28 percent right upper extremity under the fifth edition of the A.M.A., *Guides*. This opinion is of diminished probative value as it did not refer to the sixth edition of the A.M.A., *Guides* and provided no accompanying explanation or medical rationale. *See B.M.*, Docket No. 09-2231 (issued May 14, 2010) (For decisions issued beginning May 1, 2009, the sixth edition will be used).

FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>12</sup> Because of an unresolved conflict in medical opinion between appellant's physician, Dr. Wilson and Dr. Brigham, an OWCP medical adviser, on behalf of OWCP, the case shall be remanded to OWCP for referral to an impartial medical examiner. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued regarding appellant's claim for a schedule award.

### **CONCLUSION**

The Board finds that the case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 15, 2011 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: December 27, 2012  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>12</sup> See *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Elaine Sneed*, 56 ECAB 373 (2005) (OWCP regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser, OWCP shall appoint a third physician to make an examination).