



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision and order issued September 19, 2013,<sup>2</sup> the Board set aside OWCP's September 12, 2012 decision affirming a prior schedule award, and remanded the case to obtain a supplemental report from Dr. Robert Dennis, a Board-certified orthopedic surgeon and impartial medical examiner. Dr. Dennis had been selected to resolve the conflict of opinion between Dr. Nicholas Diamond, the attending osteopath, and Dr. Michael Gordon, the Board-certified orthopedic surgeon and second opinion physician, regarding the appropriate percentage of impairment to the left arm. The law and facts of the case as set forth in the Board's prior decision and order are incorporated herein by reference.

On remand of the case, OWCP requested that Dr. Dennis provide a supplemental report explaining why he excluded appellant's preexisting left elbow condition from his impairment rating. It advised Dr. Dennis of the Board's finding that it was well established that, in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.

Dr. Dennis provided an October 25, 2013 report. He noted reviewing the medical record and the Board's September 19, 2013 decision and order. Dr. Dennis explained that the objective muscle atrophy, weakness, and restricted motion of the left elbow, observed in an October 5, 2010 examination, were due to appellant's attempt to "embellish" her condition. He emphasized that the left elbow deformity was "not relatable to this injury," but that he considered it on instruction from an OWCP medical adviser. Dr. Dennis affirmed that the locked left elbow "occurred at birth or early childhood." The mechanical impairment observable on examination "related to the abnormal carrying angle which had to be relatable to a preexisting condition from long ago," unrelated to the accepted 1993 injury. Dr. Dennis again emphasized that "[i]t had to have been long preexisting, and had nothing to do with the work injury or her work capability subsequent to the injury." Alternatively, Dr. Dennis asserted that he did take the left elbow impairment into consideration, but its ultimate exclusion was immaterial because the 13 percent awarded was overly generous. An OWCP medical adviser provided a November 9, 2013 report concurring with Dr. Dennis' finding of 13 percent impairment of the left upper extremity.

By decision dated January 16, 2014, OWCP affirmed the December 22, 2010 schedule award for 13 percent impairment of the left upper extremity. It found that Dr. Dennis provided sufficient rationale as to why appellant's preexisting left elbow impairment should either be excluded from the schedule award calculation or that it had been included in the 13 percent rating.

In a January 30, 2014 letter, counsel requested a hearing, held June 19, 2014. At the hearing, he asserted that Dr. Dennis' supplemental opinion established that he wrongfully refused to consider appellant's preexisting left elbow impairment in his impairment calculation. Counsel asserted that Dr. Dennis' opinion should be discounted as his reasoning was contradictory and inconsistent.

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<sup>2</sup> Docket No. 13-503 (issued September 19, 2013).

By decision dated and finalized September 5, 2014, an OWCP hearing representative affirmed the January 16, 2014 decision, finding that Dr. Dennis' opinion was sufficiently rationalized to represent the weight of the medical evidence.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>3</sup> provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 determination is a matter which rests in the sound discretion of the 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>4</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>5</sup> It is well established that, in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.<sup>6</sup>

Section 8123 of FECA 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>7</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.<sup>8</sup>

When OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>9</sup> If the specialist is

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>6</sup> *Michael C. Milner*, 53 ECAB 446, 450 (2002).

<sup>7</sup> 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

<sup>8</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>9</sup> *Harry T. Mosier*, 49 ECAB 688 (1998).

unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.<sup>10</sup>

### ANALYSIS

OWCP accepted that appellant sustained a C6-7 disc herniation, with left hemilaminectomy and laminotomy of C5 and C7, left foraminotomy at C5-6 and C6-7, and an excision of an extruded C6-7 disc on the left. Appellant developed C6-7 radiculopathy into the left arm.

Dr. Diamond, an attending osteopath, opined that appellant had 23 percent impairment of the left arm due to the accepted injury and a preexisting locked left elbow with disuse atrophy. Dr. Gordon, a Board-certified orthopedic surgeon and impartial medical examiner with regard to a previous medical conflict, found 10 percent impairment of the left arm, modified to 13 percent by an OWCP medical adviser. OWCP issued a schedule award on December 22, 2010 for 13 percent impairment of the left arm. It then found a new medical conflict between Dr. Gordon and Dr. Diamond, and appointed Dr. Dennis, a Board-certified orthopedic surgeon, to resolve the conflict. Dr. Dennis found 13 percent impairment of the left arm. He explained that he excluded appellant's locked left elbow from his calculations as it was unrelated to the accepted cervical spine injury. OWCP then issued March 14 and September 21, 2012 decisions affirming the schedule award. The Board set aside the September 21, 2012 decision and remanded the case to OWCP to obtain a supplemental report from Dr. Dennis.

On remand of the case, Dr. Dennis provided an October 25, 2013 supplemental report, opining that the left elbow deformity and disuse atrophy were appellant's voluntary attempts to embellish her condition. However, he found that the left elbow conditions were "long preexisting," occurring at birth or early childhood. Dr. Dennis did not provide medical rationale harmonizing these divergent views. Also, although he acknowledged that preexisting conditions were to be included in schedule award ratings, he reiterated his prior, incorrect assertion that the left elbow impairment should not be considered as it had "nothing to do with the work injury." Dr. Dennis concluded by asserting both that he did include the left elbow condition in his impairment rating and that he excluded it. He commented that either way, it did not alter the 13 percent awarded as he felt this was overly generous. Dr. Dennis thus stated that appellant's left elbow condition and muscle atrophy should be excluded from the impairment rating, that he did include it, and that the issue was immaterial.

The Board finds that Dr. Dennis' supplemental report is too equivocal and contradictory to represent the weight of the medical evidence. It does not contain sufficient medical rationale to resolve the outstanding conflict of medical opinion.<sup>11</sup> As Dr. Dennis was unable to clarify his opinion, OWCP must select a new impartial medical examiner.<sup>12</sup> The case will be remanded to OWCP for appropriate development, including selection of a new impartial medical examiner.

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<sup>10</sup> *Guiseppa Aversa*, 55 ECAB 164 (2003).

<sup>11</sup> *Supra* note 8.

<sup>12</sup> *Supra* note 10.

Following this and all other development deemed necessary, OWCP shall issue an appropriate decision in the case.

On appeal, counsel asserts that although Dr. Dennis acknowledged that appellant had a preexisting left elbow condition, he improperly excluded objective weakness, atrophy, and restricted motion in his impairment rating of the left arm. He requests that OWCP disregard Dr. Dennis' opinion and accord Dr. Diamond the weight of the medical evidence. As stated above, Dr. Dennis was unable to clarify his opinion. OWCP must select a new impartial medical examiner.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 5, 2014 is set aside, and the case remanded to OWCP for additional development consistent with this decision and order.

Issued: May 7, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board