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

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| **V.W., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1002** |
| | ) | **Issued: September 7, 2007** |
| **U.S. POSTAL SERVICE, MAIN OFFICE, Newark, NJ, Employer** | ) | |

*Appearances:*
*Thomas R. Uliase, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On March 2, 2007 appellant filed a timely appeal from a September 21, 2006 decision of the Office of Workers' Compensation Programs, adjudicating her schedule award claim. Pursuant to 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 more than a 10 percent impairment of her left upper extremity.

### *FACTUAL HISTORY*

On January 24, 1995 appellant, then a 29-year-old (letter sorting machine) clerk, filed an occupational disease claim alleging that beginning in January 1995 she developed pain in her right wrist due to keying mail. The Office accepted her claim for right carpal tunnel syndrome. On February 10, 1995 appellant underwent a right carpal tunnel release. On April 24, 1998 the

Office accepted left carpal tunnel syndrome as causally related to her federal employment. Appellant did not undergo surgery on her left hand. She submitted a claim for a schedule award.

In a May 15, 1997 report, Dr. David Weiss, an osteopathic orthopedic specialist, provided findings on physical examination and diagnosed bilateral carpal tunnel syndrome. He found that appellant had a 30 percent impairment of each upper extremity due to entrapment of the median nerve at the wrist, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[1] Appellant had difficulty grasping objects bilaterally, pushing and pulling and with activities requiring fine dexterity. Her left hand pain level was rated as 4 on a scale of 0 to 10. Regarding appellant's left upper extremity, Dr. Weiss stated:

> "Examination of [appellant's] left hand revealed tenderness noted over the palmar surface of the left wrist joint. Range of motion of [her] left wrist revealed palmar flexion 75/75 degrees; dorsiflexion 75/75 degrees; radial deviation 20/20; ulnar deviation 35/35 degrees. The Tinel's sign is positive. The Phalen's sign is also positive. The Carpal Compression test is positive. It should be noted on gross observation of the hand, there is noted to be thenar atrophy."
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> "Grip strength testing performed *via* Jamar Dynamometer at level [No.] 3 revealed 8 kg [kilograms] of force strength in the right hand versus 14 kg of force strength in the left hand. [Appellant] is right hand dominant. Normal grip strength testing for a 31-year-old female is 30 kg in the right hand and 28 kg in the left hand[;] these are both abnormal readings on this patient."
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> "[Appellant] has [p]ins and needles [sensations]…. [She] awake[ns] at night with her hands asleep. [Appellant] also continues to use wrist splints at night…."

On June 16, 1997 Dr. J. Harold Bennett, an orthopedic surgeon, agreed with Dr. Weiss that appellant had bilateral carpal tunnel syndrome and permanent impairment.

On July 11, 1997 an Office medical adviser stated that appellant had a 20 percent impairment of the right upper extremity for loss of grip strength based on Table 32 at page 65 of the A.M.A., *Guides,* fourth edition. On July 15, 1997 the Office granted appellant a schedule award for 62.40 weeks from May 15, 1997 to July 25, 1998 based on a 20 percent impairment of her right upper extremity. By decision dated April 2, 1998, an Office hearing representative affirmed the July 15, 1997 decision.

A June 14, 1999 report of a nerve conduction study (NCS) and electromyogram (EMG) reported no evidence of bilateral median or ulnar neuropathies. On June 28, 2000 Dr. Dwayne E. Patterson, a Board-certified physiatrist, advised that left upper extremity motor and sensory nerve conduction studies and an EMG were normal. On July 14, 2000 Dr. G. Hadley Callaway,

[1] A.M.A., *Guides* (4th ed. 1995). Dr. Weiss did not reference specific tables or sections of the A.M.A., *Guides.*

an attending Board-certified orthopedic surgeon, noted that EMG and NCS tests revealed no cervical radiculopathy or any other neural brachial plexopathy or peripheral neuropathy.

On January 19, 2001 Dr. Harry L. Collins, Jr., a Board-certified orthopedic surgeon and an Office medical adviser, stated that appellant had no left upper extremity impairment based on the report of Dr. Callaway, who noted negative electrodiagnostic tests.

On January 23, 2001 the Office found a conflict in the medical opinion evidence between Dr. Weiss and Dr. Collins as to whether appellant had any impairment of her left upper extremity. The Office advised that it would refer her to an impartial medical specialist.

In an unsigned March 5, 2001 report, Dr. Stanley R. Bylciw, a Board-certified orthopedic surgeon and an Office referral physician,[2] provided findings on physical examination and stated that appellant had a 10 percent impairment of the left upper extremity. He did not reference the A.M.A., *Guides* or explain how he determined her impairment.

On October 18, 2001 the Office granted appellant a schedule award for 31.20 weeks[3] from March 5 to October 9, 2001 based on a 10 percent impairment of her left upper extremity. On October 23, 2001 appellant requested a hearing. By decision dated February 21, 2002, an Office hearing representative noted that the Office found a conflict in the medical evidence but did not refer appellant for an independent medical examination. She also noted that Dr. Bylciw failed to use the applicable edition of the A.M.A., *Guides* and provided insufficient medical rationale for his impairment rating. The hearing representative remanded the case for an independent medical examination on the issue of whether there was evidence of continuing left carpal tunnel syndrome and, if so, whether appellant had any left upper extremity impairment.

On April 18, 2002 the Office referred appellant, together with the case file, statement of accepted facts and a list of questions, to Dr. Paul H. Wright, a Board-certified orthopedic surgeon, for an impairment rating of her left upper extremity. The Office indicated in a document entitled, "QUESTIONS TO BE RESOLVED":

> "Please provide a narrative report, including your response to questions below. Please refer [to] the Statement of Accepted Facts[4] and the entire file.
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> "1. Does [appellant] have left carpal tunnel syndrome as a result of her job injury.… Please provide your opinion based on objective findings by results of examination and test (including Phalen's and Tinel's sign and results of any nerve condition conduction or EMG studies).

[2] The list of questions provided to Dr. Bylciw indicated that he was a referral (second opinion) physician.

[3] The Federal Employees' Compensation Act provides for 312 weeks of compensation for 100 percent loss or loss of use of an upper extremity. 5 U.S.C. § 8107(c)(1). Multiplying 312 weeks by 10 percent equals 31.20 weeks of compensation.

[4] The statement of accepted facts stated that appellant filed a claim for bilateral carpal tunnel syndrome, underwent a right carpal tunnel release and received a schedule award for impairment to the right arm. The statement of accepted facts did not state that left carpal tunnel syndrome was accepted. It did not indicate that appellant received a schedule award for a 10 percent impairment of the left upper extremity.

"2. If [appellant] has left carpal tunnel syndrome, please complete the enclosed [Form] CA 1303 for an impairment rating. Please utilize the [A.M.A., *Guides*, fifth edition] for your rating."

By decision dated June 4, 2002, the Office denied appellant's claim for more than a 10 percent impairment of the left upper extremity. On June 10, 2002 appellant requested a hearing that was held on December 19, 2005.[5]

By decision dated March 10, 2006, an Office hearing representative set aside the June 4, 2002 decision and remanded the case for the Office to obtain a copy of Dr. Wright's report and issue a *de novo* decision on appellant's entitlement to a schedule award for her left upper extremity.

In a May 7, 2002 report, obtained by the Office on March 27, 2006, Dr. Wright reviewed appellant's medical history and the statement of accepted facts. He provided findings on physical examination and stated:

"Statement of Accepted Facts indicates that [appellant] … filed a notice of occupational disease for bilateral carpal tunnel syndrome. She underwent right carpal tunnel release surgery … and was awarded a permanent partial impairment rating of 20 percent of her right upper extremity.

"The main question to be resolved is does [appellant] have left carpal tunnel syndrome as a result of her job with the [employing establishment].

"[Appellant] relates that she still has quite a bit of pain in her left upper extremity. She indicates that the pain is in the shoulder region, the elbow region, the forearm region, as well as the wrist and hand. [Appellant] relates that the pain is aggravated by activity…."

* * *

"[Appellant] relates that her No. 1 problem now is pain in the left upper extremity. She relates that it starts in the collarbone and extends down into the shoulder, down the posterior aspect of the forearm and into the long and ring fingers. She also points to the volar radial aspect of the wrist as being the location of pain….

"[Appellant] relates that her second problem is numbness in the left upper extremity. She indicates that it seems to start in the elbow and then causes the entire thumb to go numb. She also developed numbness in the outer aspect of the

[5] The record shows that appellant's June 10, 2002 hearing request was misplaced by the Office until April 8, 2005.

small finger. This seems to come and go and she is not aware of specific activities or positions that either help or cause the problem."

* * *

"[Appellant's] left hand and wrist area shows no specific swelling or effusion to the synovial joints. There is no evidence of synovitis of the IP [interphalangeal] joints, MCPs [metacarpophalangeal] or wrist joint. There is some mild puffiness in the volar radial aspect of the wrist overlying the radial artery. This is proximal to the actual wrist joint and is mildly tender. There is also some mild but palpable triggering of the thumb flexor tendon. She is tender over the CMC [carpometacarpal] joint of the left thumb, which is mildly prominent…. She has full range of motion of the fingers and no triggering or crepitus other than the thumb. Allen's testing shows good flow through both arteries at the wrist. Phalen's testing does not cause discomfort. Reverse Phalen's testing causes pain in the volar aspect of the wrist but no numbness. Two point discrimination is totally inconsistent at all fingertips at 6 mm [millimeters] and also 10 mm. Light touch sensation is present in all fingertips. The wrist shows 70 degrees dorsiflexion, 80 degrees palmar flexion, 30 degrees ulnar deviation and 10 degrees radial deviation. The left elbow has no specific tenderness, swelling or synovitis. There is some diffuse tenderness to palpation along the extensor muscles and posterior aspect of the forearm…. The elbows show 0 to150 degrees of flexion, 90 degrees supination and 80 degrees pronation. The left shoulder is mildly tender rather diffusely, especially over the anterior aspect. There is more tenderness directly over the superior aspect of the trapezius muscle on the left, which is quite light. She does have scapulothoracic crepitus with range of motion of the left shoulder. Left shoulder motion elicits complaints of pain and is limited by resisted muscle contractions. Motor strength testing of the shoulder girdle shows diminished strength in all planes and all muscle groups. Flexion and extension of the elbow and wrist also shows diminished strength to every function tested. … On specific examination of the hands, there is no evidence of thenar atrophy. There is no evidence of trophic changes.

"RADIOGRAPHS: Radiographs and additional studies were not obtained today.

"IMPRESSION: Painful left upper extremity, with finding[s] consistent with multiple areas of tendinitis fitting the overall picture of fibromyalgia.

"DISCUSSION: The specific question for today's referee examination is 'Does [appellant] have left carpal tunnel syndrome?' There is no objective evidence of carpal tunnel syndrome of the left wrist that I can detect. Her physical examination today does not indicate or even suggest carpal tunnel syndrome on the left. In addition, she has had electrodiagnostic studies which were normal on the left. Since there is no evidence of left carpal tunnel syndrome, there is no permanent partial impairment rating for left carpal tunnel syndrome. The letter from the [Office] indicates a conflict between the attending physician and the [Office] medical adviser in regards to the permanent partial impairment rating that

she was given for left carpal tunnel syndrome. I have reviewed the [A.M.A., *Guides*] for both the fourth and fifth editions and I can find no objective evidence on total review today for a permanent partial impairment rating based on carpal tunnel syndrome of the left wrist."

On April 13, 2006 the Office reissued its June 4, 2002 decision.

On April 18, 2006 appellant requested a hearing that was held on August 16, 2006. Her attorney argued that the Office misled Dr. Wright by failing to advise him that it had accepted left carpal tunnel syndrome and granted a schedule award for a 10 percent impairment of the left upper extremity. The attorney maintained that the purpose of the referral to Dr. Wright was to determine appellant's left upper extremity impairment under the A.M.A., *Guides*, not whether she had left carpal tunnel syndrome. He also questioned whether Dr. Wright had been selected by the Office under the rotational system using the Physicians' Directory System (PDS) as specified in Office procedures.[6]

By decision dated September 21, 2006, an Office hearing representative affirmed the April 13, 2006 decision.

## ***LEGAL PRECEDENT***

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulation[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. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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 regulation as the appropriate standard for evaluating schedule losses.[9]

Section 8123(a) of the Act provides that "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination."[10] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of

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[6] An Office hearing representative noted in a September 21, 2006 decision that the case record contained a PDS appointment schedule form dated April 18, 2002, documenting that the Office selected Dr. Wright as the impartial medical specialist in rotation from the PDS.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.*

[10] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots,* 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan),* 45 ECAB 207 (1993).

such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[11]

## *ANALYSIS*

The Board finds that this case is not in posture for a decision. Further development of the medical evidence is necessary to determine whether appellant has more than a 10 percent left upper extremity impairment.

The Office found a conflict in the medical opinion evidence between Dr. Weiss and Dr. Collins. It referred appellant to Dr. Wright to determine whether she had continuing left carpal tunnel syndrome and, if so, her left upper extremity impairment, based on the A.M.A., *Guides,* fifth edition. The statement of accepted facts provided to Dr. Wright, to use as a frame of reference in forming his opinion, stated that appellant filed a notice of occupational disease for bilateral carpal tunnel syndrome, underwent right carpal tunnel release surgery and received a schedule award for right upper extremity impairment. The statement of accepted facts did not include the fact that the Office accepted left carpal tunnel syndrome or that appellant had received a schedule award for left upper extremity impairment. Dr. Wright noted in his report that the statement of accepted facts reflected that appellant underwent surgery for right carpal tunnel syndrome and received a schedule award for right upper extremity impairment. He stated: "The main question to be resolved is does [appellant] have left carpal tunnel syndrome as a result of her job with the [employing establishment]. It appears that Dr. Wright believed that the Office was asking him to determine whether appellant sustained left carpal tunnel syndrome as a result of her employment, not whether she had impairment due to her accepted left carpal tunnel syndrome. He noted left upper extremity symptoms and impairments, including pain, numbness, tenderness, positive reverse Phalen's testing, decreased motor strength, decreased left shoulder range of motion and decreased radial deviation of the wrist (10 degrees).[12] As noted, Dr. Wright's diagnosis was tendinitis and fibromyalgia, not left carpal tunnel syndrome. The Board finds that the statement of accepted facts provided to Dr. Wright is not complete and accurate as it does not reflect that the Office accepted left carpal tunnel syndrome and granted appellant a schedule award based on a 10 percent impairment.[13] Therefore, Dr. Wright's report is not based on a complete and accurate factual background and is not sufficient to resolve the conflict in the medical opinion evidence as to appellant's left upper extremity impairment.

On appeal, appellant asserted that the case record does not reflect that Dr. Wright was properly selected from the PDS. An Office hearing representative noted in the September 21, 2006 decision that the case record contained a PDS appointment schedule form dated April 18, 2002, documenting that the Office selected Dr. Wright as the impartial medical specialist in

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[11] *See Roger Dingess,* 47 ECAB 123 (1995); *Glenn C. Chasteen,* 42 ECAB 493 (1991).

[12] Ten degrees of radial deviation of the wrist equals a two percent impairment according to Figure 16-31 at page 469 of the A.M.A., *Guides,* fifth edition.

[13] Office's procedures provide that a statement of accepted facts must contain the date of injury, claimant's age, the job held on the date of injury, the employer, the mechanism of injury and the claimed or accepted conditions. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.12 (June 1995); *see also Darletha Coleman,* 55 ECAB 143 (2003).

rotation from the PDS. There is no indication in the record, nor has appellant provided evidence, that the Office did not follow its procedures in selecting Dr. Wright as the impartial medical specialist from the PDS. Therefore, this argument is without merit.[14]

## ***CONCLUSION***

The Board finds that this case is not in posture for a decision. On remand, the Office should prepare a new statement of accepted facts and refer appellant to an appropriate Board-certified medical specialist for a left upper extremity impairment rating.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 21, 2006 is set aside and the case is remanded for further development consistent with this opinion.

Issued: September 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[14] Appellant indicated on appeal that Dr. Weiss had provided a June 26, 1998 report in which he identified specific tables in the fourth edition of the A.M.A., *Guides* that he used in his impairment rating. However, the case record does not contain a June 26, 1998 report from Dr. Weiss.