

FACTUAL HISTORY

On June 22, 2007 OWCP accepted that appellant, then a 43-year-old clerk, sustained employment-related right cubital tunnel syndrome and right medial epicondylitis. Appellant also has an accepted claim for bilateral carpal tunnel syndrome for which she received schedule awards for five percent impairment of both the left and right arms.³ She underwent carpal tunnel releases in 2003 and 2004 and returned to full duty. On July 25, 2007 Dr. David R. Steinberg, Board-certified in orthopedic and hand surgery, performed surgical transposition of the right ulnar nerve and medial epicondylar release. He reviewed a January 10, 2008 functional capacity evaluation and advised that appellant could return to limited duty with permanent limitations on use of her right arm. On February 29, 2008 the employing establishment offered appellant a limited-duty position that she refused. Appellant elected civil service retirement, effective March 28, 2008.

Appellant requested additional schedule awards. In a March 13, 2008 report, Dr. Steinberg provided findings on physical examination, including full elbow range of motion, and a mild sensitivity over the medial forearm. In a May 26, 2008 report, Dr. Morley Slutsky, an OWCP medical adviser Board-certified in occupational medicine, reviewed the medical record and recommended a second-opinion evaluation.

Appellant was referred to Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery. In a June 23, 2008 report, Dr. Valentino provided physical examination findings, not full elbow range of motion and normal motor and sensory examinations. He diagnosed right cubital tunnel syndrome, resolved and right medial epicondylitis. Dr. Valentino advised that appellant had reached maximum medical improvement and had no permanent impairment. On August 6, 2008 Dr. Slutsky reviewed the medical evidence. He agreed with Dr. Valentino's assessment that appellant had no ratable right upper extremity impairment.

By decision dated August 28, 2008, the Office denied appellant's claim for an additional schedule award.

On September 23, 2008 appellant requested a hearing and submitted additional medical evidence, including a normal August 12, 2008 electromyography (EMG) study.

In a September 23, 2008 report, Dr. David S. Zelouf, Board-certified in orthopedic and hand surgery, noted examination findings including diminished grip strength on the right. In a September 25, 2008 report, Dr. Steinberg advised that appellant had residual deficits, including decreased grip strength. On November 21, 2008 he noted his previous examination findings and stated that appellant had reached maximum medical improvement. Dr. Steinberg advised that, in accordance with the fifth edition of the A.M.A., *Guides*, appellant had a 10 percent right upper extremity impairment due to decreased strength under Table 16-34, a 2 percent impairment under

³ The carpal tunnel syndrome claim was adjudicated under file number xxxxxx191.

Table 16-15 due to decreased sensibility in the small and ring fingers on the right, and a 3 percent impairment for pain, for a total 15 percent right upper extremity impairment.⁴

By decision dated April 3, 2009, OWCP's hearing representative found a conflict in medical opinion between Drs. Steinberg and Valentino regarding the extent of right upper extremity impairment and remanded the case for an impartial evaluation. Appellant relocated to Georgia. On April 20, 2009 she began part-time work with Delta Airlines, transporting baggage. Appellant submitted a May 11, 2009 report from Dr. Obinwanne Ugwonalı, Board-certified in orthopedic and hand surgery. Dr. Ugwonalı noted the history of injury and provided physical examination findings. He diagnosed right hand numbness, rule out recurrent cubital tunnel syndrome.

OWCP referred appellant to Dr. Bronier L. Costas, Board-certified in orthopedic and hand surgery, as an impartial medical specialist. In a May 18, 2009 report, Dr. Costas noted the history of injury, review of the medical record, and appellant's complaint of continuing limitations including ring and little finger numbness with aching in the forearm on repetitive activity. He provided findings on physical examination including tenderness with palpation over the medial condyle and some question of a positive Tinel's sign. Sensory testing demonstrated slightly diminished grip strength in the ulnar distribution of the ring and small fingers on the right. Dr. Costas diagnosed status post carpal tunnel syndrome, resolved; status post subcutaneous anterior transposition with medical epicondylectomy and normal nerve conduction studies. He concluded that she had a five percent impairment of the right upper extremity due to decreased sensation and scar tenderness.

In a June 2, 2009 report, Dr. Wing K. Chang, a Board-certified physiatrist, reported that an EMG study showed evidence of mild bilateral carpal tunnel syndrome and no evidence of cubital tunnel syndrome or peripheral neuropathy. On June 22, 2009 Dr. Ugwonalı concurred with the diagnoses. In reports dated July 18 and 27, 2009, Dr. H.P. Hogshead, a Board-certified orthopedic surgeon and OWCP medical adviser, noted that appellant had previously received schedule awards for five percent impairments of each upper extremity. He reviewed the medical record, including the report of Dr. Costas under the sixth edition of the A.M.A., *Guides*,⁵ appellant had an additional five percent right upper extremity impairment.

On August 3, 2009 OWCP found the weight of the medical evidence rested with the opinion of Dr. Costas and granted appellant a schedule award for an additional five percent permanent impairment of the right arm.

On February 26, 2010 appellant requested reconsideration, contending that she had 15 percent impairment based on the opinion of Dr. Steinberg under the fifth edition of the A.M.A., *Guides*. She submitted a June 2, 2009 report from Dr. Chang who reiterated the electrodiagnostic findings. Dr. Ugwonalı submitted form treatment notes dated November 16, 2009 to February 16, 2010. On March 23, 2010 he noted appellant's complaints of small finger

⁴ By letter dated December 29, 2008, appellant's attorney changed the hearing request to a review of the written record.

⁵ A.M.A., *Guides* (6th ed. 2008).

numbness and sore index finger and thumb. Dr. Ugwionali provided grip test findings and diagnosed bilateral mild carpal tunnel syndrome, not likely to improve with surgery.

In a March 31, 2010 report, Dr. Costas noted the normal electrodiagnostic findings regarding cubital tunnel syndrome and advised that appellant continued to have some exquisite sensitivity over the ulnar nerve at the elbow scar. He concluded that appellant had a 10 percent right arm impairment. In an April 15, 2010 report, Dr. Hogshead, OWCP's medical adviser, noted his review of Dr. Costas' March 31, 2010 report and concluded that appellant had a 10 percent right upper extremity impairment based on carpal tunnel syndrome and right ulnar nerve lesion and was thus not entitled to an additional schedule award.

By decision dated April 20, 2010, OWCP credited the weight of medical opinion to Dr. Costas and denied modification of the August 3, 2009 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁶ and its implementing federal regulations,⁷ 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, FECA 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹ For decisions issued after May 1, 2009, the sixth edition is used.¹⁰

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).¹¹ Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).¹² The net adjustment formula is (GMFH-CDX) + (GMPE - CDX) + (GMCS- CDX).¹³

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹⁰ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹¹ A.M.A., *Guides*, *supra* note 5 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

¹² *Id.* at 385-419.

¹³ *Id.* at 411.

Section 8123(a) 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.¹⁴ When 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 on a proper factual background, must be given special weight.¹⁵

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the OWCP medical adviser providing rationale for the percentage of impairment specified.¹⁶

ANALYSIS

OWCP accepted that appellant sustained employment-related cubital tunnel syndrome and right medial epicondylitis under this claim and bilateral carpal tunnel syndrome under a separate claim. Appellant was granted schedule awards for a five percent impairment of each upper extremity on December 7, 2004. OWCP found that a conflict in medical opinion was created regarding the degree of right upper extremity impairment between her attending orthopedic surgeon, Dr. Steinberg, who found that she had a 15 percent right upper extremity impairment, and Dr. Valentino, an OWCP referral physician, who found no permanent impairment. OWCP referred appellant to Dr. Costas for a referee opinion. On August 3, 2009 appellant was granted a schedule award for an additional five percent impairment of the right upper extremity, based on Dr. Costas' opinion.

Regarding appellant's argument on appeal that the fifth edition of the A.M.A., *Guides* should be used in assessing her impairment, the Board notes that the method used in rating impairment for purposes of a schedule award is a matter which rests in the sound discretion of the Director. In the case *Harry D. Butler*,¹⁷ the Board addressed OWCP's use of the A.M.A., *Guides* to evaluate impairment since the first edition single volume published in 1971. The Director has adopted the subsequent editions of the A.M.A., *Guides* and stated the specific date when use of each edition should be made applicable to claims under FECA. Appellant has not established that the Director abused the discretion delegated under section 8107 or the implementing federal regulations to make the sixth edition of the A.M.A., *Guides* applicable to all claimants as of May 1, 2009. The fact that the sixth edition revises the evaluation methods used in previous editions does not establish an abuse of discretion. As noted in FECA Bulletin No. 09-03,¹⁸ the American Medical Association periodically revises the A.M.A., *Guides* to

¹⁴ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁵ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹⁷ 43 ECAB 859 (1992).

¹⁸ *Supra* note 10.

incorporate current scientific clinical knowledge and judgment and to establish standardized methodologies for calculating permanent impairment.

The Board finds this case is not in posture for decision. The sixth edition of the A.M.A., *Guides* provides that upper extremity impairments be classified by diagnosis which is then adjusted by grade modifiers according to the formula described above.¹⁹ Dr. Costas, who provided an impartial evaluation for OWCP, explain the basis for his conclusion that appellant had an additional five percent right upper extremity impairment. Dr. Costas advised that she had an increased impairment due to decreased sensation and scar tenderness and was entitled to five percent right upper extremity impairment, which he later increased to 10 percent impairment. Dr. Hogshead, OWCP's medical adviser agreed with that conclusion.

Schedule awards under FECA are to be based on the A.M.A., *Guides*. An estimate of permanent impairment is irrelevant and not probative where it is not based on the A.M.A., *Guides*.²⁰ Dr. Costas did not mention the A.M.A., *Guides* in either report, and Dr. Hogshead merely made a general reference that 10 percent impairment was consistent with the sixth edition of the A.M.A., *Guides*. Without a detailed report comporting with the standards of the sixth edition of the A.M.A., *Guides*, the Board is unable to determine whether appellant has an additional impairment due to her accepted employment injuries entitling her to an increased schedule award.

Accordingly, as there is insufficient probative medical opinion of record, the Board finds that the case is not in posture for decision, and the case must be remanded to OWCP for further development regarding the extent of appellant's right upper extremity impairment in accordance with the sixth edition of the A.M.A., *Guides*. After such development as deemed necessary, OWCP should issue an appropriate decision on the issue of appellant's entitlement to an additional schedule award.

CONCLUSION

The Board finds this case is not in posture for decision.

¹⁹ A.M.A., *Guides*, *supra* note 5 at 403.

²⁰ *Shalanya Ellison*, 56 ECAB 150 (2004).

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2010 decision of the Office of Workers' Compensation Programs be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: July 8, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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