

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

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**R.C., Appellant**

**and**

**U.S. POSTAL SERVICE, BULK MAIL  
CENTER, Jersey City, NJ, Employer**

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**Docket No. 11-1523  
Issued: February 3, 2012**

*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, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 16, 2011 appellant, through her attorney, timely appealed the February 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.<sup>2</sup>

**ISSUE**

The issue is whether appellant has greater than ten percent impairment of the left upper extremity (LUE).

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> The record on appeal includes evidence received after OWCP issued its February 23, 2011 decision. The Board's appellate review is limited to evidence that was in the case record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c)(1) (2011). Accordingly, any new evidence received after the February 23, 2011 decision will not be considered on appeal.

## **FACTUAL HISTORY**

Appellant, a 65-year-old retired mail handler, has an accepted claim for left carpal tunnel syndrome (CTS), which arose on or about June 18, 2004. On March 24, 2009 OWCP granted a schedule award for 10 percent impairment of the LUE. The award covered a period of 31.2 weeks from June 25, 2007 through January 28, 2008. OWCP based the award on the district medical adviser's (DMA) January 17 and December 8, 2008 reports. The DMA, Dr. Henry J. Magliato, reviewed the June 25, 2007 examination findings of Dr. David Blady, a Board-certified neurologist, whom OWCP selected to resolve a conflict in medical opinion.<sup>3</sup> Dr. Blady, the impartial medical examiner (IME), diagnosed CTS "moderate in degree," but he did not provide a specific impairment rating. Dr. Magliato reviewed the IME's examination findings and calculated a 10 percent LUE impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001). Dr. Blady later commented that Dr. Magliato's 10 percent LUE impairment rating was "certainly reasonable and appropriate." However, he did not elaborate.

By decision dated June 3, 2009, the Branch of Hearings & Review set aside the March 24, 2009 schedule award. The hearing representative found that the IME had failed to resolve the conflict in medical opinion. She further noted that the DMA, Dr. Magliato, could not cure the deficiencies in the IME's report. The hearing representative remanded the case to OWCP for referral to a new IME. She specifically instructed that the IME provide a rating under the sixth edition of the A.M.A., *Guides* (2008), and that this rating be reviewed by a new DMA not involved in the conflict.

On remand, OWCP referred appellant to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, who examined appellant on July 8, 2010 and diagnosed asymptomatic mild median nerve neuropathy, left wrist. While Dr. Pecker did not provide a specific rating under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008), he noted there was no evidence of loss of use of the upper extremity. He believed there was evidence of symptom magnification. Dr. Pecker did not administer any additional diagnostic studies. According to him, the latest electromyography/nerve conduction study (EMG/NCS), dated October 21, 2009, showed mild developmental CTS, which by itself was not indicative of significant pathology.

On August 9, 2010 Dr. Magliato, the DMA, reviewed Dr. Pecker's July 8, 2010 examination findings. He found zero percent impairment of the LUE and noted that the A.M.A., *Guides* (6<sup>th</sup> ed. 2008) would not apply with a normal examination and such mild electrodiagnostic changes.

In an August 26, 2010 decision, OWCP found that appellant was not entitled to a schedule award in excess of the previous award for 10 percent impairment of the LUE. It relied on Dr. Magliato's August 9, 2010 report.

Appellant requested a hearing, which was scheduled for December 16, 2010. In the interim, OWCP authorized a left carpal tunnel release, which was performed on November 17, 2010. At the December 16, 2010 hearing appellant noted her recent surgery and

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<sup>3</sup> Appellant's physician, Dr. David Weiss, found 38 percent LUE impairment and Dr. Morley Slutsky (DMA), found only 23 percent LUE impairment.

argued that she evidently had some impairment otherwise surgery would not have been necessary.

By decision dated February 23, 2011, the Branch of Hearings & Review affirmed OWCP's August 26, 2010 decision. The hearing representative relied on Dr. Magliato's August 9, 2010 report.

### **LEGAL PRECEDENT**

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>4</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>5</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).<sup>6</sup>

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>7</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>8</sup> Where OWCP has referred the employee to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup>

### **ANALYSIS**

The Board finds that the case is not in posture for decision. In determining that appellant had no more than 10 percent impairment of the LUE, OWCP relied on the IME's July 8, 2010 examination findings as interpreted by Dr. Magliato. This latest IME/DMA collaboration was no more persuasive than Dr. Magliato's previous interpretation of Dr. Blady's June 25, 2007 examination findings. In both instances, the designated IME did not provide a specific impairment rating as requested by OWCP and did not resolve the conflict at issue.

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<sup>4</sup> For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

<sup>7</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

<sup>8</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>9</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

Dr. Pecker's July 8, 2010 report did not provide a specific impairment rating under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008) in accordance with the previous hearing representative's specific instructions on remand. The IME's report must resolve the conflict in medical opinion.<sup>10</sup> If the report is vague, speculative, incomplete or not rationalized, it is OWCP's responsibility to secure a supplemental report from the IME to correct the defect.<sup>11</sup> The Board finds that OWCP should have referred the case back to Dr. Pecker for clarification. Consequently, the case shall be remanded for further medical development.

### **CONCLUSION**

The case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 23, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: February 3, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing & Evaluating Medical Evidence*, Chapter 2.810.11d(2) (September 2010).

<sup>11</sup> *Id.*