



examiner did not properly apply the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Appellant's counsel contends that there remains an unresolved conflict in the medical evidence and that the April 14, 2011 decision must be vacated and the matter remanded for further development.

### **FACTUAL HISTORY**

This case has been before this Board twice previously.<sup>2</sup> The facts of the case as set forth in the Board's prior Order Remanding Case dated June 10, 2010 from its second appeal are hereby incorporated into the facts of this case.<sup>3</sup> The relevant facts are set forth below.

On February 24, 1994 appellant, then a 44-year-old maintenance technician, filed a traumatic injury claim alleging that on that date while he was pushing down on a bar to move a scissor lift onto a truck, he had a sharp pain in his upper left arm and his arm went numb. OWCP accepted his claim for left shoulder strain and cervical disc syndrome and adhesive capsulitis, left shoulder.

Appellant requested a schedule award. A conflict in medical opinion arose between Dr. David Weiss, appellant's treating osteopath, and Dr. Charles A. Lefebure, a Board-certified orthopedic surgeon, regarding the extent and degree of any permanent impairment. On October 2, 2006 OWCP issued a schedule award for 20 percent permanent impairment of the left upper extremity. It based its opinion on the report of the impartial medical examiner, Dr. Joseph A. Snead, a Board-certified orthopedic surgeon. However, in a decision dated January 5, 2007, OWCP's hearing representative determined that the impartial medical examiner had not properly resolved the conflict in medical opinion and accordingly another impartial medical examination was necessary.

On remand, OWCP further developed the medical evidence. This included referring appellant to a new impartial medical examiner, Dr. Lucas J. Pavlovich, a Board-certified orthopedic surgeon, and having OWCP's medical adviser review and comment on this report. In a decision dated May 12, 2008, OWCP issued a schedule award for 25 percent impairment of the left upper extremity based on the opinion of the medical adviser. This decision was affirmed by the hearing representative in a decision dated December 17, 2008.

In the June 10, 2010 order, this Board found that OWCP's medical adviser exceeded his role. The Board noted that the impairment ratings utilized by OWCP were based on the reports of the medical adviser rather than those of the impartial medical specialist, Dr. Pavlovich. For this reason, the Board found that the conflict in medical opinion remained unresolved and remanded the case to OWCP for further development of the medical evidence.

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<sup>2</sup> In the first appeal, the Board issued a March 4, 2003 decision finding that OWCP did not abuse its discretion by denying appellant's request for reconsideration of his claim for a recurrence of disability. Docket No. 03-294 (issued March 4, 2003).

<sup>3</sup> Docket No. 09-1465 (issued June 10, 2010).

Following the Board's remand, OWCP referred appellant to Dr. Peter K. Thrush, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated August 13, 2010, Dr. Thrush, after noting that he had previously evaluated appellant on April 19, 2000, opined that appellant had a 17 percent upper extremity impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> edition 2009) (A.M.A., *Guides*), and was accordingly not entitled to a greater schedule award. OWCP referred appellant's case to the medical adviser, Dr. Christopher R. Brigham, a Board-certified physiatrist. In a report dated September 29, 2010, Dr. Brigham opined that appellant had a 15 percent left upper extremity impairment and that the current impairment did not exceed the amount previously awarded. In addition, appellant's treating osteopath, Dr. Weiss, updated his August 23, 2004 evaluation on February 11, 2011 to apply the sixth edition of the A.M.A., *Guides*, and concluded that appellant had a 29 percent impairment of the left upper extremity.

In a decision dated October 1, 2010, OWCP denied appellant's claim for an additional schedule award. Appellant requested a hearing and the hearing was held on February 15, 2011. In a decision dated April 14, 2011, an OWCP hearing representative affirmed the October 1, 2010 OWCP decision. In both OWCP's decision of October 1, 2010 and in the decision of OWCP's hearing representative dated April 14, 2011, OWCP treated Dr. Thrush as a second opinion physician and not as an impartial medical examiner as he previously evaluated appellant.<sup>4</sup> However, OWCP determined that the opinions of Dr. Thrush and Dr. Brigham, as Board-certified physicians, were of more probative value than those of appellant's treating physician, Dr. Weiss, as he was not Board certified. It further noted that the reports of Drs. Thrush and Brigham were based on more current medical examinations than those of Dr. Weiss.

### **LEGAL PRECEDENT**

A claim for an increased schedule award may be based on new exposure.<sup>5</sup> Absent any new exposure to employment factors, a claim for an increased schedule award may be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.<sup>6</sup>

In determining entitlement to a schedule award, preexisting impairment to the schedule member should be included.<sup>7</sup> Any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a

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<sup>4</sup> Dr. Thrush could not serve as impartial medical examiner as Board precedent does not allow a physician previously connected with the claim to serve as an impartial medical examiner. *R.G.*, Docket No. 11-79 (issued September 9, 2011).

<sup>5</sup> *A.A.*, 59 ECAB 726 (2008); *Tommy R. Martin*, 56 ECAB 273 (2005); *Rose V. Ford*, 55 ECAB 449 (2004).

<sup>6</sup> *James R. Hentz*, 56 ECAB 573 (2005); *Linda T. Brown*, 51 ECAB 115 (1999).

<sup>7</sup> *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446 (2002).

previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.<sup>8</sup>

The schedule award provision of FECA and its implementing regulations<sup>9</sup> set forth the number of weeks of compensation payable to employee sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.<sup>10</sup> 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 regulations as the appropriate standard for evaluating schedule losses.<sup>11</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>12</sup>

### ANALYSIS

When OWCP referred appellant's case to its medical adviser, Dr. Brigham, there was an unresolved conflict between Dr. Weiss, appellant's treating physician, and Dr. Lefebure, a second opinion physician, as to the extent and degree of appellant's impairment to his left upper extremity under the sixth edition of the A.M.A., *Guides* as found by the Board on prior appeal. On remand, although OWCP referred appellant to Dr. Thrush to resolve the conflict, the doctor himself noted that he had previously examined appellant and thus could not serve as an impartial medical examiner,<sup>13</sup> but upon conducting the evaluation was properly referred to by OWCP as a second opinion physician.

OWCP asked Dr. Brigham to review appellant's file in his capacity as an OWCP medical adviser. Following this review, however, it improperly found that no conflict in medical opinion was ever created and afforded the weight of the medical evidence to Drs. Brigham's and Thrush's opinions that appellant was not entitled to an increased schedule award.

If there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician who shall make an examination.<sup>14</sup> Although OWCP's medical adviser may review an opinion of a second

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (January 2010).

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

<sup>11</sup> *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>12</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>13</sup> *Supra* note 3.

<sup>14</sup> *K.C.*, Docket No. 11-172 (issued September 29, 2011).

opinion physician or an impartial medical examiner, the resolution of the conflict is solely the responsibility of the impartial medical examiner.<sup>15</sup> The Board finds that OWCP's hearing representative improperly concluded that no conflict in medical evidence existed regarding the extent and degree of appellant's permanent impairment. As noted above, this finding was contrary to that of this Board's on prior appeal. Further, as Dr. Thrush had previously examined appellant, he was properly referred to as a second opinion physician and not as an impartial medical examiner. As such, OWCP did not refer appellant for an impartial medical examination. The Board finds, therefore, that the conflict in medical opinion remains unresolved. The case will be remanded to OWCP for referral of appellant to an impartial medical examination pursuant to 5 U.S.C. § 8123(a). Following this and any necessary further development of the medical evidence, OWCP shall issue an appropriate decision regarding appellant's claim for an increased schedule award.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 14, 2011 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: June 12, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> *K.P.*, Docket No. 11-1012 (issued January 13, 2012).