

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

---

**M.M., Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION CENTER, Kearny, NJ,  
Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 12-1084  
Issued: October 22, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 20, 2012 appellant, through her attorney, filed a timely appeal from a December 7, 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.

**ISSUE**

The issue is whether appellant has more than a two percent right arm impairment.

**FACTUAL HISTORY**

The case was before the Board on a prior appeal. By decision dated February 27, 2003, the Board set aside OWCP decisions dated August 1 and March 20, 2002 and remanded the case

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

for further development.<sup>2</sup> The Board found that appellant had submitted sufficient evidence between her diagnosed carpal tunnel syndrome and repetitive work activity. On January 12, 2005 OWCP accepted the claim for bilateral carpal tunnel syndrome.

In a report dated August 28, 2008, Dr. Arthur Becan, an orthopedic surgeon, opined that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) appellant had a 46 percent permanent impairment to the right arm and a 52 percent impairment to the left arm. OWCP referred the case to OWCP's medical adviser for review. In a report dated March 9, 2009, the medical adviser opined that the ratings by Dr. Becan seemed way out of proportion to an examination performed by Dr. Marc Urquhart, a Board-certified orthopedic surgeon, in a second opinion evaluation on December 13, 2006.<sup>3</sup>

OWCP found that a conflict in medical opinion was created.<sup>4</sup> Appellant was referred to Dr. Andrew Carollo, a Board-certified orthopedic surgeon, selected as the impartial medical referee. In a report dated November 25, 2009, Dr. Carollo reviewed a history and provided results on examination. He opined that appellant's carpal tunnel syndrome had resolved and she had no permanent impairment. OWCP's medical adviser submitted a January 12, 2010 report noting Dr. Carollo's findings. He agreed that appellant did not have a permanent impairment to the arms.

By decision dated March 2, 2010, OWCP determined that appellant was not entitled to a schedule award. Appellant requested a hearing before an OWCP hearing representative, and submitted a June 21, 2010 report from Dr. Becan, who indicated that he was updating his impairment rating based on the sixth edition of the A.M.A., *Guides*. Dr. Becan found that she had a seven percent bilateral arm impairment, based on Table 15-23 of the A.M.A., *Guides*.

In a decision dated September 8, 2010, OWCP's hearing representative set aside the March 2, 2010 decision. The hearing representative found the case should be referred to an OWCP medical adviser for review. In a report dated October 3, 2010, the medical adviser stated that Dr. Becan's report was based on his August 28, 2008 examination, while Dr. Carollo was a later examination and appellant had no residuals of the employment injury.

By decision dated November 15, 2010, OWCP determined that appellant was not entitled to a schedule award. Appellant requested a hearing before an OWCP hearing representative. In a decision dated March 8, 2011, the hearing representative set aside the November 15, 2010 decision. The hearing representative found that there had been no conflict in medical opinion at the time of the referral to Dr. Carollo, but a conflict arose between Dr. Becan and Dr. Carollo. The case was remanded for resolution of the conflict.

---

<sup>2</sup> Docket No. 03-183 (issued March 27, 2003).

<sup>3</sup> Dr. Urquhart did not provide an opinion as to a permanent impairment in the December 13, 2006 report.

<sup>4</sup> FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

OWCP referred appellant to Dr. Michael Wujciak, a Board-certified orthopedic surgeon selected as a referee physician. In a report dated May 24, 2011, Dr. Wujciak provided a history and results on examination. He diagnosed status post carpal tunnel syndrome with minimal residual impairment on the right and no residual impairment on the left. Dr. Wujciak referred to Table 15-23 and for the right arm found grade modifiers of “0 to 1” for test findings, “1 to 2” for history, with 0 for physical findings. He stated that this “leads to a total grade modifier of 1 to 3 and essentially a grade modifier of 1 leading to a determination of right upper extremity impairment of 1.” For the left arm, Dr. Wujciak found no permanent impairment. He opined that the date of maximum medical improvement was July 10, 2006, when appellant was returned to full duty.

In a report dated June 9, 2011, an OWCP medical adviser noted that Dr. Wujciak found a grade modifier of 0 for test findings and physical findings. He used a grade modifier of 2 for history and stated that there was no functional score. According to the medical adviser, the default value was two percent and the date of maximum medical improvement was July 10, 2006.

By decision dated June 24, 2011, OWCP issued a schedule award for a two percent permanent impairment to the right arm. The period of the award was 6.24 weeks commencing July 10, 2006.

Appellant requested a hearing before an OWCP hearing representative, which was held on October 12, 2011.

By decision dated December 7, 2011, OWCP’s hearing representative affirmed the June 24, 2011 decision.<sup>5</sup> The hearing representative found that OWCP’s medical adviser represented the weight of the evidence.

### **LEGAL PRECEDENT**

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>6</sup> Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>7</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>8</sup>

---

<sup>5</sup> The Board notes that OWCP issued an October 25, 2011 decision with respect to a left arm impairment. Appellant has pursued appeal rights with respect to this decision and the issue is not before the Board on this appeal.

<sup>6</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>7</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>8</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.<sup>9</sup> In Table 15-23, grade modifiers levels (ranging from 0 to 4) are described for the categories test findings, history and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.<sup>10</sup>

### ANALYSIS

OWCP initially found a conflict under 5 U.S.C. § 8123(a)<sup>11</sup> in the medical evidence prior to the referral to Dr. Carollo. As properly noted by OWCP's hearing representative in the March 8, 2011 decision, there was no conflict with respect to permanent impairment. The medical adviser noted only that Dr. Becan's findings seemed "out of proportion" to the findings of a report over two years earlier from a second opinion physician, Dr. Urquhart. Neither the medical adviser nor Dr. Urquhart provided an opinion as to permanent impairment. Therefore there was no disagreement with Dr. Becan on the issue. Dr. Carollo was therefore a second opinion physician.<sup>12</sup>

Dr. Becan found that appellant had a seven percent arm impairment, while Dr. Carollo found she did not have an employment-related permanent impairment. To resolve the conflict between Dr. Becan and Dr. Carollo as to a permanent impairment under the sixth edition of the A.M.A., *Guides*, Dr. Wujciak was selected as a referee physician. The Board notes that Dr. Wujciak did not provide a rationalized medical opinion resolving the issue. Dr. Wujciak referred to grade modifiers of "0 to 1" and "1 to 2" in applying Table 15-23, without further explanation. There is no provision under Table 15-23 for a range of grade modifiers. Dr. Wujciak must choose one of the four grade modifiers for test findings, history and physical findings.<sup>13</sup> Based on those findings, a final grade modifier is determined. In addition, a functional scale is applied to the final grade modifier to determine the impairment. Dr. Wujciak did not provide a functional scale modification or any explanation on this issue.

OWCP referred the evidence to the medical adviser, and the hearing representative found that the medical adviser represented the weight of the medical evidence. When the case is referred to a referee physician to resolve a conflict, it is the referee, not the medical adviser, who must resolve the conflict.<sup>14</sup> As the Board noted in *C.K.*, the weight of the evidence cannot rest

---

<sup>9</sup> A.M.A., *Guides* 448-450.

<sup>10</sup> *Id.*

<sup>11</sup> *Supra* note 4.

<sup>12</sup> *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

<sup>13</sup> A.M.A., *Guides* 449, Table 15-23.

<sup>14</sup> See *W.C.*, Docket No. 11-659 (issued March 22, 2012); *R.C.*, Docket No. 11-1523 (issued February 3, 2012); *Thomas J. Fragale*, 55 ECAB 619 (2004).

with any physician other than the referee physician.<sup>15</sup> The medical adviser may verify and confirm correct application of the A.M.A., *Guides*, but cannot resolve a conflict.<sup>16</sup>

In this case, OWCP should have advised Dr. Wujciak of the deficiencies in his report and requested a supplemental report. The case will be remanded to OWCP for proper resolution of the conflict. After such further development as OWCP deems necessary, it should issue an appropriate decision.

### **CONCLUSION**

The Board finds the case is not in posture for decision and must be remanded to OWCP for further development of the medical evidence.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 7, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 22, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

---

<sup>15</sup> Docket No. 11-2094 (issued July 2, 2012); *Charles H. Miller*, Docket No. 93-2000 (issued March 22, 1995).

<sup>16</sup> *L.R.*, Docket No. 11-1397 (issued January 6, 2012).