

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

C.A., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Brecksville, OH, Employer**)

**Docket No. 13-762
Issued: April 1, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 13, 2013 appellant, through her attorney, filed a timely appeal from the January 31, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 sustained permanent impairment.

On appeal, appellant's attorney contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 20, 2004 appellant, then a 57-year-old secretary, filed an occupational disease claim alleging that she spent the morning of January 14, 2004 processing travel documents that required extensive preparation which caused strain and tension to the wrists and hands. On March 26, 2004 OWCP accepted her claim for right shoulder bursitis, right epicondylitis and bilateral carpal tunnel syndrome and she received compensation benefits. Appellant underwent a right carpal tunnel release on May 25, 2004 and left carpal tunnel release on November 9, 2004. She lost intermittent periods from work. On April 20, 2006 appellant returned to work as an administrative support clerk with restrictions.

On July 24, 2006 OWCP issued a decision terminating appellant's wage-loss compensation and medical benefits. It found that she no longer had any residuals from the accepted conditions. By decision dated January 9, 2007, an OWCP hearing representative affirmed the termination of benefits. On July 25, 2006 appellant's attorney informed OWCP that appellant had retired from federal employment effective June 30, 2006.

On November 23, 2006 appellant, through counsel, requested a schedule award. She submitted a November 6, 2006 report from Dr. Timothy Morley, an osteopath, who indicated that appellant had a 13 percent permanent impairment to her upper extremity pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001) (A.M.A., *Guides*). Dr. Morley provided physical examination findings with regard to range of motion of the right shoulder and commented on sensory loss in both of appellant's wrists due to carpal tunnel syndrome.

On July 3, 2007 OWCP referred the case to Dr. Nabil F. Angley, a Board-certified orthopedic surgeon and medical adviser. In a July 19, 2007 report, Dr. Angley determined that appellant had a 15 percent impairment of her right upper extremity pursuant to the fifth edition of the A.M.A., *Guides*. By memorandum to Dr. Angley, OWCP inquired as to why appellant had impairment especially after it determined that appellant no longer had any residuals of her accepted employment injury. In an April 9, 2008 report, he indicated that upon further review of the file and the medical opinions therein, appellant had no permanent impairment. Dr. Angley noted that Dr. Morley reported residual restrictions in the range of motion in her right shoulder that was not reported by other physicians and noted that there was full range of motion in both elbows. He further noted that Dr. Morley did not specify which upper extremity was affected by sensory loss which rendered his rating as unacceptable. Dr. Angley concluded that his prior evaluation was based on Dr. Morley's evaluation and thus may be inaccurate and that the final impairment rating was zero percent.

In a decision dated July 11, 2008, OWCP denied appellant's claim for a schedule award. In a January 29, 2009 decision, a hearing representative found an unresolved conflict between Dr. Morley, who rated a 13 percent impairment of the upper extremity, and Dr. Angley, who

determined that there was no impairment. The case was remanded for referral to an impartial medical examiner.²

On April 22, 2010 OWCP referred appellant to Dr. Michael J. Jurenovich, an osteopath, for a second opinion. In a May 12, 2010 report, Dr. Jurenovich noted that appellant had subjective complaints of pain, fatigue, discomfort and weakness-causing impairment, but noted that she took no pain pills or anti-inflammatory medications. Appellant had a full range of motion in her hands, right elbow and right shoulder with good extension, flexion, pronation and supination. Utilizing the sixth edition of the A.M.A., *Guides*, page 449 Table 15-23, Dr. Jurenovich determined that appellant had a three percent impairment based on her carpal tunnel condition. Pursuant to page 402, Table 15-5, appellant had a zero percent (no) impairment of her shoulder since the examination was unremarkable. Dr. Jurenovich noted at page 398, Table 15-4, appellant had a zero percent (no) impairment of her elbow. In a May 13, 2010 addendum, he indicated that the three percent rating was total for the bilateral carpal tunnel issues combined.

OWCP referred appellant's case to Dr. Tonne. In a report dated June 14, 2010, Dr. Tonne determined that appellant had a zero percent (no) impairment of either the left or right upper extremity. He noted that Dr. Jurenovich applied the sixth edition of the A.M.A., *Guides*, but failed to provide a detailed assessment of the modifiers according to the A.M.A., *Guides*, nor had he detailed calculations for review. Although Dr. Jurenovich found a three percent impairment to the upper extremities, it was not clear what percentage he applied to which extremity. He found a zero percent (no) impairment after applying the A.M.A., *Guides*³ due to the absence of permanent impairment due to carpal tunnel syndrome. Dr. Tonne also found that zero percent impairment applies with regard to right shoulder bursitis and right elbow lateral epicondylitis.

By decision dated June 25, 2010, OWCP denied appellant's claim for a schedule award. By decision dated September 15, 2010, an OWCP hearing representative set aside the decision. The case was remanded to Dr. Jurenovich to document a complete examination, including a more detailed description of his findings.

On remand, OWCP provided Dr. Jurenovich an opportunity to update his findings. In an October 11, 2010 report, Dr. Jurenovich stated that he still found appellant had a three percent impairment based on bilateral hand carpal tunnel issues. He advised that no grade modifier was needed.

² OWCP referred appellant to Dr. Nasimullah Rehmatullah, a Board-certified orthopedic surgeon, for an impartial medical examination. In an April 6, 2009 report, Dr. Rehmatullah stated that appellant had a six percent impairment of her right upper extremity based on the fifth edition of the A.M.A., *Guides*. In reviewing Dr. Rehmatullah's opinion on February 15, 2010, OWCP's medical adviser, Dr. Brian M. Tonne, a Board-certified orthopedic surgeon, stated that Dr. Rehmatullah had not provided complete information and that he had not followed the sixth edition of the A.M.A., *Guides*. In a March 25, 2010 letter, Dr. Rehmatullah stated that he was unable to provide a rating under the sixth edition of the A.M.A., *Guides*. Accordingly, OWCP did not utilize his opinion and continued to develop the medical evidence.

³ OWCP's medical adviser cites to A.M.A., *Guides* (sixth edition) 449, Table 15-23; 402, Table 15-5; and 398, Table 15-4.

By letter dated January 14, 2011, OWCP referred appellant to Dr. Kenneth Chapman, a Board-certified orthopedic surgeon, to resolve a conflict between Dr. Jurenovich, the second opinion physician, and Dr. Tonne with regard to appellant's permanent impairment. In a February 6, 2011 report, Dr. Chapman found that appellant had a zero percent impairment pursuant to the sixth edition of the A.M.A., *Guides*. He applied Figure 15-2 on page 388 of the A.M.A., *Guides*. Dr. Chapman noted that appellant's primary impairing diagnosis was carpal tunnel syndrome, with secondary diagnosis of bursitis of the right shoulder and lateral epicondylitis of the right elbow. On examination, he found no evidence of decreased strength, atrophy or ankylosis, no sensory changes other than subjective ones, and no other abnormality with the hands. Utilizing the tables for diagnosis-based impairment, Dr. Chapman determined that appellant had class 0 impairment of his shoulder and elbow, with a final upper extremity impairment of 0. With regard to peripheral nerve entrapment, he determined that appellant had a grade 0 and class 0 impairment based on sensory and motor, with 0 in grade modifiers, for an impairment of 0 percent.

By decision dated March 4, 2011, OWCP denied appellant's claim for a schedule award. By decision dated August 25, 2011, a hearing representative remanded the case for a *de novo* review. He noted that OWCP gave greater weight to the opinion of Dr. Chapman as an impartial medical examiner, but since Dr. Jurenovich was a second opinion physician rather than appellant's treating physician, Dr. Chapman's medical report was only entitled to the weight accorded a second opinion. The hearing representative also noted that Dr. Chapman's opinion should have been referred to OWCP's medical adviser for review and comment.

On remand, OWCP referred the case to Dr. Glen, an OWCP medical adviser. On September 15, 2011 he determined that appellant had a zero percent (no) impairment of either the right or left upper extremities based on the opinion of Dr. Chapman, whom he noted was the impartial medical examiner.

By decision dated November 17, 2011, OWCP again denied appellant's claim for a schedule award. On June 28, 2012 an OWCP hearing representative affirmed the decision, finding that Dr. Chapman was the only physician of record to provide a proper evaluation of impairment based on the sixth edition of the A.M.A., *Guides*.

On August 2, 2012 appellant requested reconsideration. She submitted a July 9, 2012 opinion by Dr. Robert C. Corn, a Board-certified orthopedic surgeon, who advised that appellant had bilateral carpal tunnel syndrome that was for the most part resolved and chronic right lateral epicondylitis. On examination, appellant evinced exquisite tenderness along the right lateral epicondylar region that became more significant with dorsiflexion of the right wrist against resistance. There was no pain along the medial aspect of the elbow and that the range of motion in the shoulder elbow, wrist and small joints of the hand were normal. Dr. Corn opined that to a reasonable degree of medical certainty, the right lateral epicondylitis was directly and causally related to the work she performed which was clerical and repetitive in nature. The repetitive use of appellant's upper extremities was significant enough to cause bilateral carpal tunnel syndrome. Dr. Corn noted that, because of abnormal upper extremities usage, appellant developed right lateral epicondylitis, and that, within a reasonable degree of medical certainty, her current symptoms related to overuse in her federal employment.

In a decision dated January 31, 2013, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations⁴ 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.⁵ 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.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

Not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member.⁸ It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.⁹ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred, describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment with the percentage of impairment computed in accordance with the A.M.A., *Guides*.¹⁰ An impairment description must be in sufficient detail so the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.¹¹

⁴ 20 C.F.R. § 10.404.

⁵ *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

⁶ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *G.E.*, Docket No. 09-1412 (issued February 17, 2010).

⁹ *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁰ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

¹¹ *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

ANALYSIS

OWCP accepted appellant's claim for right shoulder bursitis, right epicondylitis and bilateral carpal tunnel syndrome. Appellant filed a claim for a schedule award, which was denied.

The Board notes that OWCP referred appellant to Dr. Chapman to resolve a conflict between Dr. Jurenovich, a second opinion physician, and OWCP's medical adviser, with regard to appellant's permanent impairment. However, a conflict under section 8123 cannot exist unless there is a conflict between an attending physician and an OWCP physician.¹² A conflict cannot be created between an OWCP medical adviser and a second opinion physician.¹³ Accordingly, the Board finds that Dr. Chapman is not an impartial medical examiner but rather a second opinion physician.

The Board finds that this case is not in posture for decision as further development of the medical evidence is required. Dr. Morley, appellant's attending osteopath, rated a 13 percent impairment of the upper extremity without identifying the arm to which the rating applied. He provided findings of range of motion of the right shoulder and commented on sensory loss at both wrists due to carpal tunnel syndrome. Dr. Morley did not adequately explain his rating under the fifth edition of the A.M.A., *Guides*, nor did he provide findings on examination that were sufficient to allow subsequent reviewers to clearly visualize the impairment. The Board further notes that Dr. Morley's examination was conducted on November 6, 2006, and is over seven years old. Dr. Morley's opinion is of diminished probative value.

The opinion of Dr. Angley, the first OWCP medical adviser, is not probative. Dr. Angley extrapolated from the report of Dr. Morley to find impairment of 15 percent of the right upper extremity in his report dated July 18, 2007, but modified this conclusion in an April 9, 2008 report to find no impairment. In discussing the medical evidence, he noted that the medical evidence established that there were no residuals of the allowed conditions, and that therefore the impairment rating for both upper extremities would be zero percent. The Board finds that Dr. Angley confused the issue of permanent impairment of a scheduled member with the issue of disability for work based on an inquiry by a claims examiner. It is well established that a claimant may have an employment-related condition that results in permanent impairment under the A.M.A., *Guides*, without any disability for work or the need for continued medical treatment.¹⁴ In reaching his conclusion, Dr. Angley relied upon the dated medical opinion of Dr. Morley and the other physicians then of record.

The opinion of Dr. Jurenovich is also of reduced probative value. He found that appellant had a three percent impairment pursuant to the sixth edition of the A.M.A., *Guides* due

¹² *Delphia Y. Jackson*, 55 ECAB 373 (2004); *see also N.K.*, Docket No. 10-2214 (issued August 22, 2011).

¹³ A conflict under 5 U.S.C. § 8123(a) exists only when there is a disagreement between a physician making the examination for the United States and a physician of the employee. *See Leanne E. Maynard*, 43 ECAB 482, 490 (1992); *see also B.B.*, Docket No. 07-2222 (issued February 6, 2008).

¹⁴ *See B.K.*, 59 ECAB 228 (2007); *C.P.*, Docket No. 13-1293 (issued November 20, 2013); *D.L.*, Docket No. 11-1971 (issued August 21, 2012).

to findings of carpal tunnel, but no permanent partial impairment of the shoulder or elbow. Dr. Tonne, an OWCP medical adviser, reviewed Dr. Jurenovich's opinion and noted that, although Dr. Jurenovich stated that he applied the sixth edition of the A.M.A., *Guides*, he did not provide a detailed assessment of modifiers according to the A.M.A., *Guides*, or any detailed calculations for review. As noted, Dr. Jurenovich found a three percent impairment of the upper extremities, but it was not clear what percentage he applied to which extremity. OWCP provided Dr. Jurenovich an opportunity to correct the defects in his medical opinion, but his supplemental report of October 11, 2010 does not correct the defects of the May 2010 report.

In a February 6, 2011 report, Dr. Chapman found that appellant had a zero percent (no) impairment pursuant to the sixth edition of the A.M.A., *Guides*. He noted that appellant's primary impairing diagnosis was carpal tunnel syndrome with secondary diagnosis of bursitis of the right shoulder and lateral epicondylitis of the right elbow. In describing his findings, Dr. Chapman found no evidence of decreased strength, atrophy or ankylosis, no sensory changes other than subjective ones and no other abnormality with the hands. Dr. Glen, an OWCP medical adviser, reviewed Dr. Chapman's findings and argued that there was no permanent partial impairment. The Board finds that Dr. Chapman's opinion is also of reduced probative value. OWCP accepted appellant's claim for conditions affecting the right shoulder, elbow and both wrists. Dr. Chapman did not provide specific physical findings for each affected member examined. His general findings are not specific enough to clearly visualize permanent partial impairment, or lack thereof, to each member. Dr. Glen's review was based on Dr. Chapman's insufficient findings. He also gave weight to Dr. Chapman as an impartial medical examiner. As noted, Dr. Chapman is a second opinion physician.

Finally, the opinion of appellant's attending physician, Dr. Corn, is largely irrelevant. He addressed her carpal tunnel in both wrists and right epicondylitis but provided no findings regarding permanent impairment.

Accordingly, the Board finds that the case is not in posture for decision. On remand, OWCP shall refer appellant to a Board-certified orthopedic surgeon for examination and a second opinion on the extent and nature of any permanent impairment due to the accepted conditions of right shoulder bursitis, right epicondylitis and bilateral carpal tunnel syndrome. Following any further development, OWCP shall issue a *de novo* decision as to whether appellant has any permanent impairment warranting a 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 January 31, 2013 is set aside and the case is remanded for further consideration consistent with this opinion.

Issued: April 1, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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