

FACTUAL HISTORY

On August 3, 2010 OWCP accepted that appellant, then a 54-year-old building equipment mechanic, sustained right carpal tunnel syndrome due to performing his repetitive work duties over time.

On August 10, 2010 appellant filed a claim (Form CA-7) for a schedule award due to his accepted work injury.

In a March 24, 2011 report, Dr. Nicholas Diamond, an attending osteopath, discussed his review of the medical records and the results of his physical examination and provided an opinion that appellant had a seven percent permanent impairment of his right arm under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). He made reference to Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 of the sixth edition of the A.M.A., *Guides*.³ Dr. Diamond chose grade modifiers from the table for the various categories, including test findings (grade modifier 2), history (grade modifier 3), and physical findings (grade modifier 3). Regarding the grading of the test findings category, he made reference to appellant's March 16, 2010 electromyogram (EMG) testing. Dr. Diamond discussed appellant's daily symptoms with respect to history and his grip, pinch and sensation findings with respect to physical findings.⁴ He then averaged the grade modifiers and chose the default value of eight percent for the grade modifier category. Appellant's functional scale of 54 reduced the right arm impairment from eight percent to seven percent.⁵

On August 27, 2011 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed the opinion of Dr. Diamond and determined that appellant had five percent permanent impairment of his right arm under the standards of the sixth edition of the A.M.A., *Guides*. He indicated that, applying Table 15-23, he disagreed with Dr. Diamond's assignment of grade modifier values. Dr. Berman stated:

“[T]est findings indicate motor conduction block, Grade 2 based upon test findings, history significant intermittent symptoms, grade modifier 2. [P]hysical examination by Dr. Diamond demonstrated normal two-point discrimination of the right hand at [four millimeters], grip strength was slightly reduced on the right compared to the left, however, was within normal limits. The Phalen's test was noted to be negative, as was the Tinel's test on examination by Dr. Diamond. There was no evidence of decreased sensation. Therefore, this represented grade modifier 1. Therefore, the calculation is 2 plus 2 plus 1 equals 5 divided by 3, 1.6,

³ A.M.A., *Guides* 449, Table 15-23 (6th ed. 2009).

⁴ Dr. Diamond indicated that grip strength testing performed via Jamar Hand Dynamometer at Level III revealed 32 kilograms of force strength in the right hand versus 51 kilograms of force strength in the left hand. Pinch key unit revealed 7.5 kilograms in the right hand versus 10 kilograms in the left hand. Semmes-Weinstein Monofilament testing revealed a diminished sensibility of the right hand and two-point discrimination was four millimeters in the right hand.

⁵ *Id.*

rounded off to 2. Therefore, this represents grade modifier 2 with a Grade C default value midpoint five percent impairment. Based upon this evaluation, the [QuickDASH] score is 54, which is grade modifier 2 and does not increase it. Therefore, the recommendation is five percent impairment.”

By decision dated March 9, 2012, OWCP granted appellant a schedule award for five percent permanent impairment of his right arm. The award ran for 15.6 weeks from March 24 to July 11, 2011 and was based on the impairment rating of Dr. Berman.

In a May 11, 2012 decision, an OWCP hearing representative set aside OWCP’s March 9, 2012 schedule award decision. OWCP was directed to refer the case file to Dr. Berman for a supplemental opinion regarding as to why Dr. Diamond’s grade modifier determinations were improper.

In a May 14, 2012 supplemental report, Dr. Berman further discussed why appellant’s history and the findings on physical examination and diagnostic testing justified his opinion that appellant had a grade modifier 2 for test findings, a grade modifier 2 for history and a grade modifier 1 for physical findings. He continued to indicate that appellant had five percent permanent impairment of his right arm.

By decision dated June 1, 2012, OWCP granted appellant a schedule award for a five percent permanent impairment of his right arm based on the opinion of Dr. Berman.

In a December 4, 2012 decision, an OWCP hearing representative remanded the case to OWCP in order to refer appellant for a second opinion evaluation regarding the permanent impairment of his right arm.

On February 26, 2013 OWCP referred appellant to Dr. Robert Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation. In a February 26, 2013 report, Dr. Draper provided a history of appellant’s injury and reported the findings of his physical examination. He determined that appellant had five percent permanent impairment of his right arm under the standards of the sixth edition of the A.M.A., *Guides*. Dr. Draper’s impairment calculation was based on his opinion that appellant had a grade modifier 2 for test findings, a grade modifier 2 for history and a grade modifier 2 for physical findings. He indicated that appellant’s diagnostic testing showed motor conduction block, that he had significant intermittent symptoms and that his physical examination showed some decreased light touch sensation over the right index finger. Dr. Draper indicated that appellant’s functional scale did not change his right arm impairment from the default value of five percent.

On March 8, 2013 Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, determined that appellant had a three percent permanent impairment of his right arm under the standards of the sixth edition of the A.M.A., *Guides*. His impairment calculation was based on his opinion that appellant had a grade modifier 1 for test findings, a grade modifier 1 for history and a grade modifier 1 for physical findings. Dr. Slutsky stated:

“I used Dr. Draper’s exam[ination] and he incorrectly assigned a score of 2 for physical findings. [Dr. Draper] indicated there was median nerve motor block

without an explanation as to how he arrived at this conclusion. The electrodiagnostic findings do not meet the criteria for median nerve conduction block using Appendix 15-B, page 487 [of the sixth edition of the A.M.A., *Guides*]. I agree with the functional scale score. Appellant's final average [grade modifier] is 1 (as opposed to the 2 assigned by Dr. Draper)."

In a March 13, 2013 decision, OWCP determined that appellant has a three percent permanent impairment of his right arm as opposed to the five percent impairment for which a schedule award was previously awarded.

By letter dated March 14, 2013, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$4,828.75 based on the determination that he was only entitled to a schedule award for three percent permanent impairment of his right arm. It also made a preliminary determination that appellant was without fault in the creation of the overpayment and provided him an opportunity to request waiver of recovery of the overpayment.

During a July 15, 2013 hearing before an OWCP hearing representative, counsel argued that there was a conflict in the medical opinion evidence between the impairment rating of Dr. Diamond and the impairment ratings of Drs. Berman, Draper and Slutsky.

In a September 30, 2013 decision, OWCP affirmed its March 13, 2013 schedule award determination that appellant had no more than a three percent permanent impairment of his right arm.⁶

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing regulations⁸ 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 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 regulation as the appropriate standard for evaluating schedule losses.⁹ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.¹⁰

⁶ Due to appellant's financial circumstances, OWCP also granted appellant's request for waiver of recovery of the \$4,828.75 overpayment of compensation.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404 (1999).

⁹ *Id.*

¹⁰ 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.¹¹ 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.¹²

Section 8123(a) of FECA provides in pertinent part: “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.”¹³ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁴

ANALYSIS

OWCP accepted right carpal tunnel syndrome and found that appellant had three percent permanent impairment of his right arm based on the impairment rating of Dr. Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser.

The Board finds that there is a conflict between the impairment rating of Dr. Diamond, an attending osteopath, and the impairment rating of Dr. Slutsky. The impairment rating of Dr. Diamond also conflicts with and creates a conflict with the impairment ratings of Dr. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, and the impairment rating of Dr. Draper, a Board-certified orthopedic surgeon who served as an OWCP referral physician.

In a March 24, 2011 report, Dr. Diamond provided an opinion that appellant had a seven percent permanent impairment of his right arm under the standards of the sixth edition of the A.M.A., *Guides*. He made reference to Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 and chose grade modifiers from the table for the various categories, including test findings (grade modifier 2), history (grade modifier 3), and physical findings (grade modifier 3). Regarding the grading of the test findings category, Dr. Diamond made reference to appellant’s March 16, 2010 EMG testing. He discussed appellant’s daily symptoms with respect to history and his grip, pinch and sensation findings with respect to physical findings. Dr. Diamond then averaged the grade modifiers and chose the default value of eight percent for the grade modifier category. Appellant’s functional scale of 54 reduced the right arm impairment from eight percent to seven percent.

¹¹ See A.M.A., *Guides* 449, Table 15-23.

¹² A survey completed by a given claimant, known by the name *QuickDASH*, may be used to determine the functional scale score. *Id.* at 448-49.

¹³ 5 U.S.C. § 8123(a).

¹⁴ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

In contrast, OWCP's physicians of record calculated different impairment ratings for appellant's right arm because they had differing opinions regarding appellant's grade modifier values. In August 27, 2011 and May 14, 2012 reports, Dr. Berman determined that appellant had a five percent permanent impairment of his right arm under the standards of the sixth edition of the A.M.A., *Guides*. This determination was based on his opinion that appellant had a grade modifier 2 for test findings, a grade modifier 2 for history and a grade modifier 1 for physical findings. In a February 26, 2013 report, Dr. Draper determined that appellant had a five percent permanent impairment of his right arm under the standards of the sixth edition of the A.M.A., *Guides*. His impairment calculation was based on his opinion that appellant had a grade modifier 2 for test findings, a grade modifier 2 for history and a grade modifier 2 for physical findings. On March 8, 2013 Dr. Slutsky determined that appellant had three percent permanent impairment of his right arm under the standards of the sixth edition of the A.M.A., *Guides*. His impairment calculation was based on his opinion that appellant had a grade modifier 1 for test findings, a grade modifier 1 for history and a grade modifier 1 for physical findings.

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between the impairment rating of Dr. Diamond and the impairment ratings of OWCP's physicians (Drs. Berman, Draper and Slutsky) regarding the extent of appellant's right arm impairment. On remand OWCP should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After such further development as it deems necessary, OWCP should issue an appropriate decision regarding appellant's schedule award claim.

CONCLUSION

The Board finds that there is a conflict in the medical opinion evidence regarding whether appellant has more than three percent permanent impairment of his right arm and the case is remanded to OWCP for further development of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 3, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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