



## **FACTUAL HISTORY**

Appellant has two compensation claims that have been administratively combined. On February 13, 2006 he, then a 57-year-old clerk, filed an occupational disease claim for compensation (Form CA-2) alleging that he sustained a left shoulder injury as a result of his duties of federal employment. Appellant identified repetitive activity such as picking up magazines and parcels and sweeping mail. On February 14, 2006 he underwent left shoulder arthroscopic surgery by Dr. Samuel Puleo, a Board-certified orthopedic surgeon. OWCP accepted this claim on June 9, 2006 for left shoulder calcific tendinitis with rotator cuff impingement.

On July 23, 2007 appellant filed a Form CA-2 alleging that he sustained carpal tunnel syndrome as a result of repetitive activity in his federal employment. He again identified repetitive work activity as a clerk. On January 18, 2008 OWCP accepted bilateral carpal tunnel syndrome. Appellant underwent a left carpal tunnel release on April 24, 2008 and a right carpal tunnel release on June 4, 2008, performed by Dr. Puleo.

OWCP referred appellant to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated April 3, 2009, Dr. Didizian provided a history and results on examination. He diagnosed status post bilateral carpal tunnel release with residual weakness and stiffness of the digits.

On April 21, 2009 appellant submitted a report dated February 24, 2009 from Dr. David Weiss, an osteopath, providing a history and results on examination. Dr. Weiss diagnosed: cumulative and repetitive trauma disorder; left shoulder impingement syndrome; left shoulder calcific tendinosis; a partial thickness rotator cuff tear to the left shoulder; status post arthroscopic surgery to the left shoulder; left wrist and forearm chronic flexor tendinitis; bilateral carpal tunnel syndrome; and status post left and right open carpal tunnel syndrome release. He provided an opinion as to permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

OWCP referred appellant to Dr. Didizian, requesting an opinion with respect to a permanent impairment under the A.M.A., *Guides*. In a report dated August 31, 2009, Dr. Didizian provided results on examination. He opined that appellant had a 24 percent left arm impairment, based on the regional shoulder grid, loss of range of motion, and sensory and motor findings. Dr. Didizian also opined that appellant had a 10 percent right arm impairment for carpal tunnel syndrome. He stated that the date of maximum medical improvement (MMI) was 90 days after the June 4, 2008 carpal tunnel surgery.

On October 13, 2009 appellant submitted a second report from Dr. Weiss dated February 24, 2009. Dr. Weiss opined that, under the sixth edition of the A.M.A., *Guides*, appellant had a 12 percent left arm impairment. He found that appellant had a 5 percent impairment for partial rotator cuff tear under Table 15-5, and 8 percent for left median nerve entrapment neuropathy under Table 15-23. For the right arm, Dr. Weiss opined that appellant had a seven percent impairment based on entrapment neuropathy.

In a report dated October 20, 2009, an OWCP medical adviser, Dr. Arnold Berman, opined that appellant had a six percent impairment to the left arm based on loss of shoulder range of motion. He stated that carpal tunnel was not indicated as an accepted condition, but if it was included, then there would be a two percent impairment. In a brief report dated November 9, 2009, Dr. Berman opined that appellant had a two percent right arm and eight percent left arm impairment. He found the date of MMI was April 3, 2009.

By decision dated November 18, 2009, OWCP issued a schedule award for a two percent impairment to each arm. The period of the award was 12.48 weeks from April 3, 2009.

In a letter dated November 24, 2009, appellant requested a hearing before an OWCP hearing representative. By decision dated February 22, 2010, the hearing representative remanded the case to OWCP. The hearing representative found that the case records should be combined, a statement of accepted facts prepared and the case referred to an OWCP medical adviser for an opinion as to the percentage of permanent impairment under the A.M.A., *Guides*.

OWCP prepared a statement of accepted facts and referred the case for a second opinion examination by Dr. Robert Smith, a Board-certified orthopedic surgeon. In a report dated April 15, 2010, Dr. Smith provided a history and results on examination. He opined that appellant had a six percent left arm impairment under Table 15-23 of the A.M.A., *Guides* for carpal tunnel syndrome. Dr. Smith also found a two percent left arm impairment based on application of the shoulder regional grid. As to the right arm, he opined that appellant had a six percent impairment for carpal tunnel syndrome. Dr. Smith indicated the date of MMI for the left wrist was April 24, 2009 and for the right wrist June 4, 2009, as this was one year after surgery.

In a report dated June 6, 2010, Dr. Berman indicated that he agreed with Dr. Smith as to the percentages of impairment. He stated that the date of MMI was April 15, 2010.

By decision dated June 23, 2010, OWCP issued a schedule award for an additional six percent for the left arm and four percent for the right arm. The period of the award was 31.20 weeks from April 15, 2010.

Appellant requested a hearing before an OWCP hearing representative. By decision dated September 15, 2010, the hearing representative set aside the June 23, 2010 OWCP decision. The hearing representative found that the medical adviser had not properly considered the report of Dr. Weiss, who had provided a rationalized opinion with regard to permanent impairment.

In a report dated October 31, 2010, Dr. Berman stated that the rating by Dr. Weiss could not be considered as he provided an opinion under the fifth edition of the A.M.A., *Guides*.

By decision dated January 6, 2011, OWCP found that appellant was not entitled to an additional schedule award. Appellant again requested a hearing by letter dated January 11, 2011.

In a decision dated March 14, 2011, an OWCP hearing representative set aside the January 6, 2011 decision. She noted that Dr. Weiss had submitted a report with an opinion under the sixth edition of the A.M.A., *Guides*, and the medical adviser should be asked to provide a thorough discussion regarding the ratings of Dr. Smith and Dr. Weiss.

By report dated March 22, 2011, Dr. Berman stated that Dr. Didizian's report did not confirm loss of sensation reported by Dr. Weiss. According to Dr. Berman, Dr. Weiss also stated that the distal clavicle resection was carried out as part of the operative procedure, when only a subacromial decompression was done.

In a decision dated June 2, 2011, OWCP found that appellant was not entitled to an additional schedule award. Appellant again requested a hearing by letter dated June 7, 2011. A hearing was held on September 21, 2011.

By decision dated December 19, 2011, the hearing representative remanded the case for further development. She noted that Dr. Weiss did not base an opinion as to permanent impairment on a distal clavicle resection. The case was again remanded for review by an OWCP medical adviser.

In a report dated February 27, 2012, Dr. Berman acknowledged that Dr. Weiss used a diagnosis of partial rotator cuff tear, and while Dr. Weiss' use of grade modifiers was questionable, Dr. Berman recommended acceptance of five percent left arm impairment under the shoulder regional grid table. According to Dr. Berman, there were discrepancies between Dr. Weiss and Dr. Didizian. In applying Table 15-23 for entrapment neuropathy, Dr. Berman stated grade modifier three for history was acceptable, but grade modifier one was proper for physical findings because Dr. Didizian found no sensory or motor loss. He opined that appellant had a 10 percent left arm impairment and a 6 percent right arm impairment.

By decision dated March 5, 2012, OWCP issued a schedule award for an additional two percent to the left arm. The period of the award was 6.24 weeks from June 30, 2009.

In a letter dated March 8, 2012, appellant requested a hearing before an OWCP hearing representative. A hearing was held on June 13, 2012.

By decision dated August 21, 2012, the hearing representative set aside the March 8, 2012 decision and remanded for yet further development. She indicated that it was unclear why Dr. Berman referred to the findings of Dr. Didizian, without discussing the more recent second opinion report from Dr. Smith. The hearing representative remanded the case to ask Dr. Berman to consider the reports of Dr. Smith and Dr. Weiss.

In a report dated October 22, 2012, Dr. Berman stated that Dr. Weiss was not a Board-certified orthopedic surgeon, and his opinion was not as credible as Dr. Smith's.

By decision dated May 1, 2013, OWCP found that appellant was not entitled to an additional schedule award. Appellant requested a hearing by letter dated May 6, 2013. On September 3, 2013 appellant indicated that the request was for a review of the written record.

In a decision dated November 29, 2013, the hearing representative found appellant was not entitled to an additional schedule award. She noted that the schedule award decisions had each contained a different date of MMI, and the case was remanded for an opinion from an OWCP medical adviser on the issue.

By report dated December 4, 2013, Dr. Berman noted that the last examination was April 15, 2010, and “it would not be appropriate to reach a conclusion utilizing these older examinations.” He recommended an additional second opinion examination. Dr. Berman also stated his recommendations as to the degree of impairment remained unchanged.

In a decision dated January 8, 2014, OWCP stated that Dr. Berman had found no change in his opinion. The decision did not make specific findings with respect to date of MMI.

### **LEGAL PRECEDENT -- ISSUES 1 & 2**

5 U.S.C. § 8107 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>2</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>3</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>4</sup>

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI has been reached is a factual one which depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.<sup>5</sup>

### **ANALYSIS -- ISSUES 1 & 2**

As the above history indicates, the development of the case has involved repeated referrals to an OWCP medical adviser, Dr. Berman. This development did not properly resolve the medical issue. Dr. Weiss, the attending physician, provided an opinion as to the degree of permanent impairment to the upper extremities under the sixth edition of the A.M.A., *Guides*. He applied Table 15-5, the shoulder regional grid, and Table 15-23, for entrapment neuropathy.<sup>6</sup> Dr. Weiss opined that appellant had a 12 percent left arm impairment and a 7 percent right arm

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<sup>2</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>3</sup> *A. George Lampo*, 45 ECAB 441 (1994).

<sup>4</sup> FECA Bulletin No. 09-03 (March 15, 2009).

<sup>5</sup> *L.H.*, 58 ECAB 561 (2007).

<sup>6</sup> A.M.A., *Guides* 401-05, Table 15-5, and 449, Table 15-23.

impairment, and explained how the tables were applied.<sup>7</sup> As noted by a hearing representative in the September 15, 2010 decision, Dr. Weiss provided a rationalized medical opinion on the issue.

On the other hand, the second opinion physician, Dr. Smith, provided an opinion that conflicted with Dr. Weiss. He found that appellant had an eight percent left arm and six percent right arm permanent impairment under the A.M.A., *Guides*. Dr. Smith explained how he determined the impairment and applied relevant tables. It is well established that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>8</sup> The case will accordingly be remanded to OWCP for selection of a referee physician<sup>9</sup> and proper resolution of the conflict in accord with established procedures. The referee physician should provide a reasoned medical opinion with respect to an employment-related permanent impairment under the A.M.A., *Guides*.

The referee physician should also provide an opinion with respect to the proper date of maximum medical improvement. As noted by the hearing representative in the November 29, 2013 decision, the record contains several different dates with respect to MMI. The hearing representative remanded the case on this issue but the January 8, 2014 decision did not make any specific findings on the issue. After such development as is warranted to resolve the issues presented, OWCP should issue an appropriate decision.

### CONCLUSION

The Board finds that there is a conflict in the medical evidence and the case is remanded to OWCP for resolution of the conflict.

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<sup>7</sup> The Board has previously noted concern with medical reports of Dr. Weiss which provide ratings of impairment under the sixth edition of the A.M.A., *Guides* without a contemporaneous medical evaluation -- frequently relying upon stale and outdated physical findings previously utilized for an evaluation of impairment under the fifth edition. While, Dr. Weiss herein provides a rating under the sixth edition based upon a prior evaluation, the prior evaluation in this matter was not unduly stale. *See Cf. K.S.*, Docket No. 12-43 (issued March 12, 2013); *L.T.*, Docket No. 13-997 (issued June 10, 2014); *W.M.*, Docket No. 12-773 (issued March 29, 2013).

<sup>8</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a). The Board notes that in the August 21, 2012 hearing representative decision, 5 U.S.C. § 8123(a) was cited, but no finding that a conflict existed was made.

<sup>9</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4 (May 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 8, 2014 and November 29, 2013 are set aside and the case remanded for further action consistent with this decision.

Issued: October 20, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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