

impairment of the right and left arms.² OWCP schedule award decisions dated November 27, 2006 and June 26, 2007 had found that the impairment to the left arm was 18 percent and 5 percent to the right arm. The medical evidence, however, showed the 18 percent impairment was to the right arm and 5 percent to the left arm. With respect to any additional impairment, the Board found the medical evidence from the second opinion physician, Dr. James Gaul, a Board-certified neurologist, required clarification as the degree of permanent impairment in the arms. The Board also found the date of maximum medical improvement (MMI) should be clarified based on the medical evidence.

By decision dated August 2, 2012, the Board again remanded the case with respect to the degree of permanent impairment in the upper extremities.³ The Board found that an August 18, 2010 report from Dr. David Pashman, a Board-certified orthopedic surgeon selected as a referee physician, was not sufficient to resolve the conflict in the medical evidence. The detailed history provided in the Board's prior decisions is incorporated herein by reference. The Board will summarize the relevant facts below.

OWCP accepted appellant's January 31, 1990 occupational disease claim for bilateral carpal tunnel syndrome; aggravation of nerve root plexus disorder; and thoracic outlet syndrome. Appellant underwent approved right carpal tunnel release surgery on May 11, 1992.

In support of her claim for a schedule award, appellant submitted a December 31, 2001 report from her treating physician, Dr. David Weiss, an osteopath, who opined that she had a 31 percent impairment of the right arm and a 26 percent impairment of the left arm pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a February 11, 2003 second opinion report, Dr. Richard Bennett, a Board-certified neurologist, opined that she had no objective evidence of carpal tunnel syndrome or thoracic outlet syndrome and no permanent motor or sensory impairment due to carpal tunnel syndrome or thoracic outlet syndrome. OWCP found a conflict in medical opinion between Dr. Weiss and Dr. Bennett as to whether appellant had permanent impairment related to her accepted injury and referred her to Dr. Marcia L. Halpern, a Board-certified neurologist. In a July 8, 2003 report, Dr. Halpern opined that appellant had no permanent impairment under the fifth edition of the A.M.A., *Guides*.

By decision dated August 25, 2003, OWCP determined that appellant was not entitled to a schedule award. Appellant requested a hearing aid in a July 6, 2004 decision, an OWCP hearing representative affirmed the August 25, 2003 decision.

Appellant requested reconsideration and submitted an October 19, 2004 report from Dr. Weiss, who opined that she had a total left arm impairment of 37 percent and a right arm impairment of 47 percent pursuant to the fifth edition of the A.M.A., *Guides*. OWCP found a conflict in medical opinion relative to permanent impairment between Dr. Weiss and Dr. Halpern and referred appellant to Dr. Gaul, an impartial medical examiner, to resolve the conflict as to the existence and degree of permanent impairment related to appellant's accepted conditions. In

² Docket No. 08-1362 (issued August 26, 2009).

³ Docket No. 11-1805 (issued August 2, 2012).

an October 25, 2005 report, Dr. Gaul opined that she had a 40 percent impairment of the right arm and a 25 percent impairment of the left arm for sensory and motor deficits.

OWCP forwarded Dr. Gaul's report to an OWCP medical adviser. In a November 8, 2005 report, the medical adviser opined that Dr. Gaul's findings should not be accepted. He recommended that appellant receive a schedule award for a 1 percent impairment of her right and a 10 percent impairment of her left arm under the A.M.A., *Guides*, based on sensory deficits. By decision dated November 27, 2006, OWCP issued a schedule award for a 10 percent impairment of the left arm and a 1 percent impairment of the right arm.

In a decision dated March 15, 2007, an OWCP hearing representative found that the October 19, 2004 report from Dr. Weiss had not created a conflict in the evidence, and Dr. Gaul was therefore reduced to a second opinion physician. The case was remanded for a supplemental report from Dr. Gaul. In a report dated May 24, 2007, Dr. Gaul opined that appellant had a 29 percent right arm impairment and a 17 percent left arm impairment under the fifth edition, A.M.A., *Guides*. In a June 10, 2007 report, an OWCP medical adviser opined that appellant had an 18 percent right arm impairment based on sensory deficits and carpal tunnel motor loss, and a 5 percent left arm impairment based on sensory deficits.

By decision dated June 26, 2007, OWCP found that appellant was entitled to a schedule award for an additional impairment of eight percent for the left arm and four percent for the right arm. The date of MMI was identified as October 19, 2004. In a decision dated November 26, 2007, an OWCP hearing representative found the medical evidence established that appellant had an 18 percent impairment to the right arm, and a 5 percent impairment to the left arm. The hearing representative modified the June 26, 2007 OWCP decision to correct the "typographical error" which had earlier found 18 percent was to the left arm and the 5 percent to the right arm.

In the August 26, 2009 decision, the Board set aside the November 26, 2007 decision. The Board found Dr. Gaul's May 24, 2007 report was insufficient to resolve the schedule award issues. In addition, the Board found the evidence required further development with respect to the date of MMI.

OWCP requested a supplemental report from Dr. Gaul. In a report dated September 9, 2009, Dr. Gaul opined that appellant had a 17 percent left arm impairment under the fifth edition of the A.M.A., *Guides* due to motor deficits. In a report dated October 17, 2009, an OWCP medical adviser opined that, under the sixth edition of the A.M.A., *Guides*, appellant had a five percent permanent impairment to each arm. He reported the date of MMI to be May 24, 2007.

By decision dated December 23, 2009, OWCP found that appellant was not entitled to an additional schedule award based on the evidence of record. The date of MMI was found to be May 24, 2007.

Appellant requested a hearing before an OWCP hearing representative, which was held on April 10, 2010. In a report dated April 16, 2010, Dr. Weiss provided an opinion under the sixth edition of the A.M.A., *Guides*. He opined that appellant had a 22 percent impairment of each arm based on sensory and motor deficits.

In a decision dated June 25, 2010, an OWCP hearing representative found that a conflict existed between Dr. Weiss and the medical adviser. To resolve the conflict, appellant was referred to Dr. David Pashman, a Board-certified orthopedic surgeon. In a report dated August 18, 2010, Dr. Pashman opined that she had a two percent right arm impairment and a one percent left arm impairment. By report dated September 17, 2010, an OWCP medical adviser reviewed Dr. Pashman's findings and stated that the impairment for the right arm was four percent and one percent for the left arm.

By decision dated September 20, 2010, OWCP found that appellant was not entitled to an additional schedule award based on the evidence of record. In a decision dated April 26, 2011, an OWCP hearing representative affirmed the September 20, 2010 OWCP decision, finding that Dr. Pashman represented the weight of the evidence. The hearing representative also found further action was required regarding the schedule award payments.⁴ Appellant filed an appeal with the Board.

In a decision dated June 23, 2011, OWCP clarified the schedule award payment issues and noted that appellant was not entitled to any additional compensation payments with respect to a schedule award.

The Board set aside the April 26, 2011 OWCP decision on August 2, 2012. The Board found that Dr. Pashman's report was not a rationalized medical opinion on the issue presented. The case was remanded for further development of the medical evidence with respect to permanent impairment and date of MMI.

In a letter dated August 28, 2012, OWCP requested an additional report from Dr. Pashman. Dr. Pashman submitted a September 6, 2012 report, stating that appellant had full range of motion in her upper extremities. He stated that there were no objective signs of cervical radiculopathy or radial tunnel syndrome. Dr. Pashman reaffirmed his opinion with respect to a permanent impairment under the A.M.A., *Guides*. By report dated September 27, 2012, an OWCP medical adviser opined that appellant had a two percent impairment to each arm based on bilateral carpal tunnel syndrome. He noted that review of additional diagnostic testing could change his opinion.

In a decision dated October 16, 2012, OWCP found that appellant was not entitled to an additional schedule award based on the medical evidence. Appellant requested a hearing before an OWCP hearing representative. By decision dated December 17, 2012, the hearing representative set aside the October 16, 2012 OWCP decision. She found that Dr. Pashman's September 6, 2012 report merely reiterated his prior findings without clarification. The case was remanded for selection of a new referee physician to resolve the conflict.⁵

⁴ Specifically, OWCP was instructed to pay the claimant an additional nine percent permanent impairment of the right arm, which was not properly paid by decision dated November 27, 2006. However, the amount of this payment was to be reduced by four percent due to an overpayment of the left arm awarded in error by decision dated July 26, 2007. This four percent of the left arm was determined to represent an overpayment, which should be computed and deducted from the payment due to the claimant.

⁵ The hearing representative also noted the statement of accepted facts should include aggravation of brachial plexus lesions as an accepted condition.

OWCP selected Dr. Ian Fries, a Board-certified orthopedic surgeon, as a referee physician. In a report dated April 9, 2013, Dr. Fries provided a history, detailed review of medical records, and reported results on examination. He opined that appellant had a nine percent impairment to each arm. Dr. Fries referred to Table 15-23 of the A.M.A., *Guides*, finding a six percent arm impairment for carpal tunnel and six percent for the brachial plexus injury. The 6 percent was combined with 50 percent of the second nerve to result in a 9 percent impairment to the right arm and 9 percent for the left arm.

By decision dated April 30, 2013, OWCP found that appellant was not entitled to an additional schedule award. It acknowledged that the correct prior schedule awards were for an 18 percent right arm impairment and a 5 percent left arm impairment. OWCP found that Dr. Fries had found appellant had an 18 percent impairment to the upper extremities, and his report represented the weight of the medical evidence.

Appellant again requested a hearing before an OWCP hearing representative, which was held on August 29, 2013. In a decision dated December 18, 2013, the hearing representative set aside the April 30, 2013 OWCP decision. She found an OWCP medical adviser should have reviewed Dr. Fries' report, and the case was accordingly remanded to OWCP.

In a report dated January 3, 2014, an OWCP medical adviser indicated that he disagreed with Dr. Fries with respect to a brachial plexus lesion or thoracic outlet syndrome rating. He stated that there was no consistent objective evidence of a continuing condition in this regard. According to the medical adviser, 9 of 11 electromyogram/nerve conduction velocity (EMG/NCV) studies found no evidence of brachial plexus lesions or thoracic outlet syndrome, and Dr. Fries had no opportunity to review a September 5, 2013 study. He found that there would be no impairment due to brachial plexus lesions or thoracic outlet syndrome. As to carpal tunnel syndrome, the medical adviser applied Table 15-23 would be nine percent for each arm.⁶ He also stated the MMI would be April 2, 2013.

By decision dated January 8, 2014, OWCP found that appellant was not entitled to an additional schedule award. It found the medical evidence did not establish more than a 23 percent combined impairment to the arms.

Appellant requested a review of the written record by an OWCP hearing representative. In a decision dated August 29, 2014, the hearing representative affirmed the January 8, 2014 decision. She found that the evidence established a 9 percent impairment to each arm, and the 18 percent current impairment was less than the 23 percent previously awarded for the arms.

LEGAL PRECEDENT

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

⁶ The medical adviser applied a more severe grade modifier for test findings that applied by Dr. Fries.

permanent impairment of the scheduled member or function.⁷ 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.⁸ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁹

ANALYSIS

As the factual history indicates, there has been significant development of the medical evidence in this case, as well as some confusion regarding the schedule awards issued to appellant. The Board notes that the record does establish that appellant has received schedule awards for an 18 percent right arm impairment, and 5 percent for the left arm. The initial schedule awards dated November 27, 2006 and June 26, 2007 had reversed the right and left arm impairments, but since that time OWCP has clearly noted that an error was made and the schedule awards issued to appellant represented an 18 percent impairment to the right arm and a 5 percent impairment to the left arm.

On the last appeal, the Board noted that an unresolved conflict existed in the medical record with respect to the degree of permanent impairment under the A.M.A., *Guides*. In this regard the Board finds that once again the issue was not fully resolved by the referee physician. OWCP has ignored a fundamental principle involving schedule awards and referee physicians: it is the referee, not an OWCP medical adviser that must resolve the conflict.¹⁰ Although a medical adviser found a nine percent impairment to each arm in his January 3, 2014 report, he clearly disagreed with the application of Table 15-23 by Dr. Fries, the referee physician. He found no contribution should be considered from the accepted conditions of brachial plexus or thoracic outlet syndrome, because in the medical adviser's opinion these conditions had resolved. The medical adviser then provided a different application of Table 15-23 with respect to carpal tunnel syndrome than the method used by Dr. Fries. The proper procedure at that point should have been to refer his report (along with a September 5, 2013 EMG/NCV noted by the medical adviser) to Dr. Fries for clarification as to his opinion regarding a permanent impairment.¹¹ Dr. Fries could then provide a proper explanation as to how Table 15-23 should be applied in this case. The case will be remanded to properly resolve the issue.

⁷ 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).

⁸ *A. George Lampo*, 45 ECAB 441 (1994).

⁹ FECA Bulletin No. 09-03 (March 15, 2009).

¹⁰ *See Richard R. LeMay*, 56 ECAB 341 (2005); *Thomas J. Fragale*, 55 ECAB 619 (2004).

¹¹ *See K.O.*, Docket No. 10-745 (issued November 19, 2010) (an OWCP medical adviser stated that while he agreed with the final conclusion of the referee physician, the appropriate methodology was not used. The Board remanded the case for clarification from the referee). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(g) (February 2013) (noting clarification from the referee may be necessary following medical adviser review).

Once the conflict is properly resolved, OWCP should properly assess whether appellant has an increased impairment in either the right or left arm. In this regard OWCP has heretofore applied an improper analysis to the issue. It is not appropriate to combine impairments to the extremities when considering an increased schedule award.¹² An impairment to one arm is a separate and distinct issue from an impairment to the other arm. The issue is not whether appellant has a current impairment of more than 23 percent to both arms. The issue is whether she has a current impairment to the left arm that is greater than 5 percent, or to the right arm that is greater than 18 percent.¹³

On remand OWCP should properly resolve the issue as to a current impairment and then properly consider whether appellant is entitled to an additional schedule award. It should also clarify the date of MMI, as noted in the Board's prior decision. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case must be remanded to OWCP for additional development and a proper analysis of the issue presented.

¹² *B.C.*, Docket No. 13-1855 (issued July 22, 2014). In that case, OWCP had issued a schedule award for a 57 percent impairment to both legs, which represented 37 percent to the left leg, and 20 percent to the right leg. When medical evidence showed a current impairment of 26 percent to each leg, OWCP had improperly concluded that no increased award was possible since the combined current impairment of 52 percent was less than the 57 percent previously awarded.

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 29, 2014 is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: July 17, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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