

specialist does not constitute the weight of opinion evidence as he did not reference the right thumb surgery in his June 6, 2014 medical report which is especially important since he acknowledges appellant's complaint about loss of sensation in his thumb and lack of grip strength on physical examination. He further asserts that an OWCP medical adviser likewise failed to discuss appellant's trigger thumb condition, its work relatedness, and to rate impairment for this condition.

FACTUAL HISTORY

This case has been before the Board on four previous occasions.² In the most recent appeal, the Board set aside a July 23, 2012 OWCP merit decision which affirmed appellant's entitlement to a schedule award for four percent impairment of the right upper extremity and three percent impairment of the left upper extremity.³ The Board remanded the case because Dr. Jeffrey B. Daniels, was not properly selected as an impartial medical specialist and there remained an unresolved conflict of medical opinion evidence between Dr. Craig H. Rosen, an attending Board-certified orthopedic surgeon, and Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, regarding the extent of appellant's bilateral upper extremity permanent impairment. The facts and circumstances outlined in the prior Board decisions are herein incorporated by reference. The relevant facts are set forth below.

On June 17, 1998 appellant, then a 74-year-old distribution clerk,⁴ filed an occupational disease claim alleging that he sustained bilateral carpal tunnel syndrome of the wrists as a result of his repetitive work duties. On July 17, 1998 OWCP accepted the claim for aggravation of bilateral carpal tunnel syndrome. On December 22, 1999 it authorized left carpal tunnel release performed on February 25, 1998 and right carpal tunnel release performed on December 9, 1998.

In an April 18, 2000 decision, OWCP granted appellant a schedule award for seven percent impairment of the right hand based on Dr. Magliato's April 5, 2000 opinion. In a November 18, 2003 decision, the Board set aside a December 19, 2002 OWCP decision which denied modification of the April 18, 2000 decision. The Board determined that a conflict existed between Dr. Rosen and Dr. Magliato regarding the extent of appellant's bilateral upper extremity impairment. The Board remanded the case for OWCP to refer appellant to an impartial medical specialist to resolve the conflict.

On remand, following the issuance of the Board's April 12, 2013 order, OWCP, by letter dated May 20, 2013, referred appellant, together with a statement of accepted facts and the medical record, to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, for a second opinion. In a June 7, 2013 report, Dr. Askin reviewed the history of injury and presented examination findings. He opined that appellant had no impairment under the sixth edition of the

² Docket Nos. 01-1202 (issued August 13, 2002), 03-1106 (issued November 18, 2003), 05-1344 (issued October 5, 2005), and 13-321 (issued April 12, 2013).

³ Order Remanding Case, Docket No. 13-321 (issued April 12, 2013).

⁴ On February 28, 1999 appellant retired from the employing establishment.

American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Askin advised that appellant had diabetes which was an independent cause of peripheral neuropathy and that his neuropathic symptoms and osteoarthritis of the hands and right wrist were not secondary to the accepted employment-related aggravation of bilateral carpal tunnel syndrome. He related that appellant's carpal tunnel releases obviated the carpal tunnel process and that his current complaints were not related to his carpal tunnel syndrome, but instead were related to ailments seemingly separated in time and space from his accepted work injury.

On July 23, 2013 Dr. Magliato reviewed Dr. Askin's June 7, 2013 report and agreed with his finding of zero percent impairment of the bilateral upper extremities under the sixth edition of the A.M.A., *Guides*. He noted that appellant had reached maximum medical improvement on June 7, 2013, the date of Dr. Askin's examination, but believed it probably occurred many years ago when OWCP had previously granted him a schedule award for seven percent impairment of the right upper extremity.

In an August 8, 2013 decision, OWCP denied appellant's claim for an additional impairment to the bilateral upper extremities based on Dr. Askin's medical opinion.

By letter dated August 26, 2013, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. He subsequently submitted a December 27, 2013 report from Dr. David O. Weiss, an attending osteopath, who referenced the August 28, 2000 findings contained in his August 31, 2000 report.⁵ Dr. Weiss set forth his August 28, 2000 findings on examination pertaining to loss of range of motion and other testing. At that time, he diagnosed cumulative and repetitive trauma disorder, bilateral carpal tunnel syndrome, trigger finger phenomenon of the right thumb, and a history of left trigger finger phenomenon. Dr. Weiss also diagnosed status post bilateral carpal tunnel syndrome releases and status post a May 2000 right trigger finger release of the right thumb. He found that appellant, under tables of the sixth edition of the A.M.A., *Guides*, had 10 percent impairment of the right upper extremity due to entrapment neuropathy of the median nerve of the right wrist and right thumb stenosing tenosynovitis, and 7 percent impairment of the left upper extremity due to entrapment neuropathy of the median nerve of the left wrist. Dr. Weiss determined that he had reached maximum medical improvement on August 28, 2000, the date of his examination.

In a February 20, 2014 decision, an OWCP hearing representative set aside the August 8, 2013 decision and remanded the case to OWCP for further medical development. She found that OWCP failed to follow the Board's instructions on remand. Instead of referring appellant to an impartial medical examiner as instructed by the Board, it referred him to Dr. Askin, who conducted an additional second opinion examination. The hearing representative instructed OWCP to refer appellant to an appropriate Board-certified specialist for an impartial medical examination to assess permanent partial impairment to his upper extremities due to his accepted work injury in accordance with the sixth edition of the A.M.A., *Guides*. She found that Dr. Weiss' updated impairment ratings warranted further development and instructed OWCP to

⁵ In the August 31, 2000 report, Dr. Weiss found that appellant had 20 percent impairment of the right upper extremity and 10 percent impairment of the left upper extremity based on the fourth edition of the A.M.A., *Guides*.

update the statement of accepted facts to reflect whether appellant's trigger thumbs and reported May 2000 right trigger thumb surgery were employment related.

On remand, OWCP prepared an updated statement of accepted facts and a list of questions, and referred appellant to Dr. Ronald L. Gerson, a Board-certified orthopedic surgeon, for an impartial medical examination. It did not ask Dr. Gerson to advise whether the right thumb condition diagnosed by Dr. Weiss and resultant surgery were employment related.

In a June 6, 2014 report, Dr. Gerson reviewed a history of injury and medical record, noted appellant's symptoms which included an occasional pins and needles sensation in the right thumb, and provided findings on physical examination. Utilizing tables of the sixth edition of the A.M.A., *Guides*, he determined that appellant had two percent impairment to each upper extremity due to his accepted employment-related aggravation of bilateral carpal tunnel syndrome.

On July 1, 2014 Dr. Magliato reviewed Dr. Gerson's June 6, 2014 report. He agreed with Dr. Gerson's analysis and conclusion that appellant had two percent impairment of each upper extremity under the sixth edition of the A.M.A., *Guides*. Dr. Magliato advised that appellant had reached maximum medical improvement on June 6, 2014, the date of Dr. Gerson's examination.

In a July 28, 2014 decision, OWCP denied appellant's claim for an increased schedule award for the bilateral upper extremities based on the opinions of Drs. Gerson and Magliato.

By letter dated August 5, 2014, counsel requested an oral hearing before an OWCP hearing representative. He subsequently submitted a December 19, 2014 report from Dr. Weiss who reviewed Dr. Gerson's June 6, 2014 report. Dr. Weiss applied the sixth edition of the A.M.A., *Guides* to the findings in his August 31, 2000 report. He determined that appellant had eight percent impairment of the right upper extremity due to entrapment neuropathy of the median nerve of the right wrist and right thumb stenosing tenosynovitis, and three percent impairment of the left upper extremity due to entrapment neuropathy of the median nerve of the left wrist.

In a March 18, 2015 decision, an OWCP hearing representative affirmed the July 28, 2014 decision, finding that Dr. Gerson's opinion was sufficiently rationalized to represent the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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. The A.M.A., *Guides* (6th ed.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

2009) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability, and Health (ICF).⁹ Under the sixth edition, the evaluator identifies the impairment for the Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹

Section 8123 of FECA provides that, 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.¹² In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹⁴ If an impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.¹⁵

ANALYSIS

The Board finds that the case is not in posture for decision because the opinion of Dr. Gerson is insufficient to establish the degree of permanent impairment.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010); and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

⁹ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, ICF: A Contemporary Model of Disablement.

¹⁰ *Id.* at 383-419.

¹¹ *Id.* at 411.

¹² 5 U.S.C. § 8123; see *Charles S. Hamilton*, 52 ECAB 110 (2000).

¹³ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

¹⁴ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

¹⁵ *Harold Travis*, 30 ECAB 1071, 1078 (1979).

OWCP appointed Dr. Gerson, a Board-certified in orthopedic surgeon, to resolve a conflict of medical opinion regarding the extent of appellant's bilateral upper extremity impairment. On appeal, counsel contends that OWCP did not further develop the medical evidence regarding whether appellant's right trigger thumb condition and resultant surgery were employment related as instructed on remand by the hearing representative's February 20, 2014 decision. The Board notes that in the February 20, 2014 decision, the hearing representative set aside an August 8, 2013 OWCP decision which found that appellant did not have more than four percent impairment of the right upper extremity and three percent impairment of the left upper extremity, and remanded the case for further development of the medical evidence. She instructed OWCP to refer appellant to an impartial medical specialist along with an updated statement of accepted facts that indicated whether his trigger thumbs and May 2000 right trigger thumb surgery were work related to determine the extent of his employment-related permanent impairment of the upper extremities. On remand of the case, OWCP directed Dr. Gerson to address only the extent of appellant's impairment due to the accepted employment-related aggravation of bilateral carpal tunnel syndrome. The list of questions provided to Dr. Gerson did not ask him to address whether appellant's thumb conditions and right thumb surgery were employment related as instructed by the hearing representative.

Dr. Gerson provided a detailed report discussing the accepted bilateral wrist condition. He opined that appellant had two percent impairment to each arm due to the accepted condition under the sixth edition of the A.M.A., *Guides*. However, Dr. Gerson did not discuss whether appellant had a bilateral trigger thumb condition for which he underwent right thumb surgery in May 2000 due to his employment and any resultant permanent impairment under the sixth edition of the A.M.A., *Guides*. The case will therefore be remanded for OWCP to obtain a supplemental report from Dr. Gerson addressing whether appellant's bilateral thumb condition and right thumb surgery were causally related to his federal employment and the extent of his bilateral upper extremity impairment. Following this and any other development OWCP deems necessary, OWCP will issue a *de novo* decision in the case.

CONCLUSION

The Board finds that this case is not in posture for a decision on the extent of permanent impairment to appellant's bilateral upper extremities.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 2, 2015
Washington, DC

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

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

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