United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 15-1694**
	)	**Issued: February 9, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Westampton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 5, 2015, appellant, through counsel, filed a timely appeal from a March 18, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish more than a two percent impairment of each upper extremity, for which he received schedule awards; (2) whether OWCP properly found an overpayment of compensation in the amount of $7,734.99; and (3) whether OWCP properly found that the overpayment was not subject to waiver.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before March 7, 2007 appellant, then a 50-year-old letter carrier, sustained bilateral carpal tunnel syndrome in the performance of duty due to repetitive hand and wrist motion.[2] January 29, 2007 nerve conduction velocity and electromyography testing showed severe left and mild right median neuropathy at the wrists, demonstrating bilateral carpal tunnel syndrome. Dr. Gary Goldstein, an attending Board-certified orthopedic and plastic surgeon, performed a left carpal tunnel release on March 10, 2008 and a right carpal tunnel release on March 31, 2008. OWCP approved both procedures. Dr. Goldstein submitted progress reports through April 2008. He released appellant to full duty on May 6, 2008, noting that appellant reported that the surgery had resolved his bilateral hand numbness. In a May 27, 2008 report, Dr. Goldstein noted that appellant reported some paresthesias in both hands when mowing his lawn or riding a bicycle. He opined that appellant could return to duty, with restrictions against "using his hands in an impact situation" or performing overly repetitive work. Appellant returned to full-duty work on May 28, 2008.[3]

On December 23, 2008 appellant claimed a schedule award. In support of his claim, he submitted an October 7, 2008 report from Dr. Arthur Becan, an orthopedic surgeon retained to perform an impairment rating. Dr. Becan reviewed medical records. He had appellant complete *Quick*DASH questionnaires scoring 75 percent on the left and 79 percent on the right. On examination, Dr. Becan observed bilaterally positive Tinel's and Phalen's tests, diminished light touch sensibility by Semmes-Weinstein monofilament testing at 4.6 milligrams (mgs) on the right and 3.6 mgs on the left, 8 kilogram (kg) grip force strength on the right versus 10 kg on the left, 6 kg pinch strength on the right versus 4 kg on the left, and bilaterally restricted motion. He diagnosed bilateral carpal tunnel syndrome with chronic median neuropathy, and bilateral de Quervain's disease of the wrists. Dr. Becan found 39 percent permanent impairment of the right arm and 45 percent permanent impairment of the left arm under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) then in effect.

On January 28, 2009 Dr. Morley Slutsky, an OWCP medical adviser and Board-certified in preventive medicine with a specialty in occupational medicine, reviewed Dr. Becan's report and assessed 10 percent permanent impairment of each arm. He noted that Dr. Becan had not provided evidence that he tested appellant for deficits in the muscles innervated by the median nerve. Dr. Becan responded by February 12, 2009 letter, explaining that the Semmes-Weinstein monofilament test results at 3.61 or higher indicated diminished sensibility and not just diminished light touch sensibility. An OWCP medical adviser reviewed Dr. Becan's letter on February 25, 2009 and opined that it did not alter his previous assessment of 10 percent impairment of each arm. He opined that appellant had reached maximum medical improvement (MMI) as of October 7, 2008, the date of Dr. Becan's evaluation.

[2] OWCP initially denied the claim by decisions dated June 5 and October 22, 2007. It subsequently accepted the claim by decision issued January 25, 2008.

[3] In a December 16, 2008 report, Dr. Goldstein restricted appellant from delivering mail during the last 90 minutes of his shift due to "significant weakness of his hands and arms."

OWCP found a conflict of medical opinion between Dr. Becan and Dr. Slutsky. On August 13, 2010 it obtained an impartial opinion from Dr. Howard Zeidman, a Board-certified orthopedic surgeon. Dr. Zeidman reviewed the medical record and statement of accepted facts. On examination, he found bilateral volar scars, intact ulnar nerve sensation, and "no evidence of first dorsal interosseous atrophy on either hand." Dr. Zeidman noted that Dr. Becan's October 7, 2008 assessment was premature, as it was performed only seven months after appellant's March 2008 surgeries, whereas the predicted interval for MMI was one to two years. He opined that appellant had attained MMI as of August 13, 2009. Referring to Table 15-23,[4] Dr. Zeidman assessed four percent permanent impairment of each upper extremity. Dr. Andrew Merola, an OWCP medical adviser and Board-certified orthopedist, reviewed Dr. Zeidman's report on September 28, 2009 and concurred with his assessment.

By decision dated October 19, 2009, OWCP granted appellant a schedule award for four percent permanent impairment of each upper extremity. The period of the award ran from August 13, 2009 to February 3, 2010.

In an October 26, 2009 letter, counsel requested a review of the written record. He contended that OWCP had delayed processing appellant's claim, thereby depriving him of the opportunity to receive a larger schedule award under the fifth edition of the A.M.A., *Guides*. Accompanying a January 22, 2010 letter, counsel submitted Dr. Becan's January 8, 2010 report updating his October 7, 2008 impairment rating to comply with the sixth edition of the A.M.A., *Guides*. Regarding the left arm, Dr. Becan referred to Table 15-23, he found a grade 1 diagnosis-based impairment Class of Diagnosis (CDX) due to carpal tunnel syndrome. He assessed a grade 2 modifier for Clinical Studies (GMCS) for unspecified findings, a grade 3 modifier for Functional History (GMFH) due to unspecified factors, and a grade 3 modifier for findings on Physical Examination (GMPE) due to decreased pinch strength. Applying the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), or (3-1) + (3-1) + (2-1), Dr. Becan found an average modifier of 3, leaving the impairment rating at eight percent. For the right arm, he noted a GMCS of 1, GMFH of 3, and GMPE of 2 for decreased sensation. Applying the net adjustment formula, Dr. Becan found an average grade modifier 2. As appellant's *Quick*DASH score on the right was 79 percent, this increased the overall impairment to 6 percent.

By decision dated February 2, 2010, an OWCP hearing representative remanded the case for consideration of Dr. Becan's January 8, 2010 report. He noted that at the time the award was granted it was correct as it was based on the only reports which had used the 6th edition. The case was remanded for Dr. Becan's new report based on the 6th edition to be reviewed by an OWCP medical adviser.

In a February 27, 2010 report, Dr. Merola, the medical adviser opined that Dr. Becan's January 8, 2010 report relied on his October 7, 2008 clinical findings that were "still within the healing period" and did not represent MMI. He therefore recommended that Dr. Zeidman's report continue to represent the weight of the medical evidence.

[4] Table 15-23, page 449 of the sixth edition of the A.M.A., *Guides* is entitled "Entrapment/Compression Neuropathy Impairment."

By decision dated March 19, 2010, OWCP found that Dr. Becan's supplemental report failed to establish any additional impairment than the four percent of each arm previously awarded.

Appellant, through counsel, requested an oral hearing. Following a June 25, 2010 hearing, by decision dated September 10, 2010, an OWCP hearing representative set aside the March 19, 2010 decision, finding that as Dr. Merola had not examined appellant, the case remained with a new unresolved conflict between Dr. Becan and Dr. Zeidman. The hearing representative remanded the case for a physical examination by a new physician.[5]

On remand, the case was forwarded to Dr. Stuart Trager, a Board-certified orthopedic surgeon, as impartial medical specialist. He submitted a December 15, 2010 report concurring generally with Dr. Zeidman's impairment rating. On January 14, 2011 Dr. Merola, an OWCP medical adviser, agreed with Dr. Trager that Dr. Zeidman's impairment rating should remain controlling.

By decision dated February 1, 2011, OWCP denied an additional schedule award, based on Dr. Trager's opinion as the weight of the medical evidence. Counsel disagreed, and on February 8, 2011 requested a hearing, held May 26, 2011. At the hearing, counsel asserted that Dr. Trager's opinion could not represent the weight of the medical evidence as he did not provide his reasoning or clinical findings.

By decision dated August 5, 2011, an OWCP hearing representative set aside OWCP's February 1, 2011 decision, finding that Dr. Trager's assessment required clarification. On remand of the case, Dr. Trager submitted a November 21, 2011 addendum report noting that the improvement in appellant's grip strength indicated that there was no impairment beyond the four percent for each arm previously awarded. On February 29, 2012 Dr. Henry J. Magliato, an OWCP medical adviser, recommended that OWCP obtain Dr. Trager's impairment calculations and clinical findings. OWCP then contacted Dr. Trager's office, which explained that in providing the impairment calculation, Dr. Trager had not reexamined appellant, but had reviewed the record to render his impairment evaluation. It scheduled appellant for another appointment with Dr. Trager on April 25, 2012.

Dr. Trager provided a May 4, 2012 report noting a *Quick*DASH score of 40 or 43 depending on interpretation, diminished pinch strength bilaterally, and positive carpometacarpal grind tests bilaterally. He found a GMCS of 1 or 2, a GMFH of 2 for intermittent findings, a GMPE of 3 for weakness, and a "functional scale" of 2, resulting in an average grade modifier 2. Dr. Trager thereby found five percent permanent impairment of the left arm. On June 12, 2012 Dr. Magliato concurred with Dr. Trager's finding of five percent permanent impairment of each arm. However, OWCP determined that Dr. Trager had failed to provide an impairment rating for appellant's right arm.

On August 21, 2012 it requested that Dr. Trager examine appellant's right arm and provide an impairment evaluation. Dr. Trager responded in a September 12, 2012 report, finding

[5] OWCP found a conflict of medical evidence between Dr. Becan and Dr. Zeidman on the extent of appellant's impairment.

five percent impairment of the right arm using the same calculation methods as for the left arm. On January 10, 2013 Dr. Magliato concurred with Dr. Trager's assessment.

By decision dated January 31, 2013, OWCP found that appellant had an additional one percent permanent impairment of each upper extremity, for a total of five percent to each arm. The period of the award ran from December 15, 2010 to January 27, 2011.

In a February 7, 2013 letter, counsel requested a hearing, held May 29, 2013. At the hearing, counsel asserted that Dr. Trager's opinion could not represent the weight of the medical evidence as his reports were vague, equivocal, and did not comply with the A.M.A., *Guides.*

By decision dated October 17, 2013, an OWCP hearing representative set aside the January 31, 2013 schedule award, finding that OWCP had made numerous requests for Dr. Trager to clarify his opinion, but he failed to do so. She directed selection of a new impartial medical examiner.

On remand of the case, OWCP selected Dr. John P. Nolan, Jr., a Board-certified orthopedic surgeon, as impartial medical specialist. It provided screen capture images for 22 physicians who were bypassed during the selection process using the Medical Management Application. Among them, OWCP bypassed Dr. J. Whitaker as his scheduler was "on vacation until next week," so the claims examiner was instructed to continue the search. It also noted that Dr. William Iannacone's voice mailbox was full. The remainder of the physicians were either not in a germane specialty or did not perform referee examinations.

Dr. Nolan provided a March 11, 2014 report reviewing the medical record and statement of accepted facts. On examination, he found flexion contractures of the first metacarpophalangeal joint of both hands, fixed on the right and at 20 degrees on the left, negative Tinel's and Phalen's signs. Dr. Nolan found no obvious thenar or hypothenar atrophy, but found trace atrophy bilaterally on the left and right thenar eminence. There was some wasting and atrophy in the first web space bilaterally, inconsistent objectively decreased sensation to sharp and dull in the dorsal aspect of both wrists. Appellant completed a *Quick*DASH questionnaire, scored at 55.8 percent. Three trials of strength testing using a Jamar dynamometer showed diminished strength bilaterally. Dr. Nolan opined that, according to Tables 15-21 and 15-23, appellant had a class 1, 0 to 10 percent "upper body impairment." He noted that appellant's first metacarpal joint osteoarthritis made assessment difficult. Dr. Nolan therefore opined that because appellant's *Quick*DASH score had improved, and there was "minimal, if any, thenar atrophy," and appellant was working full duty, he had five percent permanent impairment of each upper extremity.

On April 9, 2014 Dr. Magliato reviewed Dr. Nolan's report, which he found confusing and lacking in detail. He noted that Dr. Nolan did not "give values for GMFH, GMPE, and GMCS."

OWCP obtained a supplemental report from Dr. Nolan on July 2, 2014. Dr. Nolan found "either normal or minor sensory deficit" and "either mild or absent" symptoms of carpal tunnel syndrome. He noted "questionable trace atrophy in the thenar eminence area" possibly related to carpal tunnel syndrome or to the thumb flexion contractures. Dr. Nolan found a functional scale

of 2, GMPE of 1, and GMFH of 1, resulting in an average modifier 1.33, rounded down to 1. He therefore found two percent impairment of each upper extremity. On August 5, 2014 OWCP medical adviser Dr. Magliato concurred with Dr. Nolan's assessment.

By decision dated August 19, 2014, OWCP found that appellant had not established additional impairment, according Dr. Nolan the weight of the medical evidence.

By notice dated August 25, 2014, OWCP advised appellant of its preliminary determination that an overpayment in the amount of $7,734.99 was created in his case, as he received schedule awards for a total of five percent impairment of each arm whereas the weight of the medical evidence established only two percent impairment of each arm.

Appellant disagreed, and in a September 5, 2014 letter requested reconsideration of the August 19, 2014 decision and a prerecoupment hearing regarding the August 25, 2014 preliminary notice of overpayment. Counsel submitted a December 19, 2014 report from Dr. Becan, explaining that Dr. Nolan's impairment rating was incorrect. Dr. Becan noted that although Dr. Nolan minimal found atrophy of the thenar eminence, he assessed a GMPE of 1, although Table 15-23 provides a GMPE of 3 for any atrophy.[6]

At a prerecoupment hearing, held December 22, 2014, counsel contended that Dr. Nolan's opinion could not represent the weight of the medical evidence as he misapplied the A.M.A., *Guides*, as Dr. Becan explained in his December 19, 2014 report. Additionally, counsel asserted that there was no overpayment of compensation as the appropriate percentage of permanent impairment was still at issue.

By decision dated March 18, 2015, an OWCP hearing representative affirmed the August 19, 2014 decision finding no additional impairment, and the August 25, 2014 overpayment determination. OWCP found that appellant was not at fault in creation of the overpayment. However, the overpayment was not subject to waiver as he had failed to submit any financial information.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[7] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. It, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has

[6] A.M.A., *Guides* 449.

[7] 5 U.S.C. § 8107.

concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides* second edition, published in 2009.[9]

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).[10] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - DCX) + (GMCS - CDX).

In addressing upper extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[12] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - DCX).[13]

Section 8123(a) of FECA provides 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.[14] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[15] In situations where there are 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 on a proper factual background, must be given special weight.[16]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome in the performance of duty, with bilateral median nerve releases performed in March 2008. Appellant claimed a schedule award on December 23, 2008, based on an October 7, 2008 assessment by

[8] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *id*., Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides*, 3, section 1.3, "The ICF: A Contemporary Model of Disablement" (6th ed. 2009).

[11] *Id*. at 494-531 (6th ed. 2008).

[12] *Id*. at 385-419, *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[13] *Id*. at 411.

[14] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[15] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[16] *Anna M. Delaney*, 53 ECAB 384 (2002).

Dr. Becan, an orthopedic surgeon. Dr. Becan found 39 percent permanent impairment of the right arm and 45 percent permanent impairment of the left arm under the fifth edition of the A.M.A., *Guides* then in effect. An OWCP medical adviser disagreed, leading to the selection of Dr. Zeidman, a Board-certified orthopedic surgeon, to resolve the conflict. Dr. Zeidman found four percent permanent impairment of each arm.

On October 19, 2009 OWCP issued a schedule award for four percent permanent impairment of each arm. Following additional development, it set aside the schedule award and selected Dr. Trager, a Board-certified orthopedic surgeon, as impartial medical examiner. Based on his opinion, OWCP issued an October 17, 2013 schedule award for an additional one percent permanent impairment of each upper extremity. However, it subsequently found that Dr. Trager had not provided a reasoned assessment of appellant's impairments. OWCP then selected Dr. Nolan, a Board-certified orthopedic surgeon, as the new impartial medical examiner in the case. Dr. Nolan provided a March 14, 2014 report finding "upper body impairment" according to Tables 15-21 and 15-23, noting that appellant's hands could not be fully evaluated due to his bilateral thumb arthritis. In a July 2, 2014 supplemental report, he found that appellant had minimal thenar atrophy. Dr. Nolan calculated two percent impairment of each arm.

OWCP issued an August 19, 2014 decision finding no additional impairment, based on his opinion as the weight of the medical evidence. In response, Dr. Becan explained on December 22, 2014 that Dr. Nolan misapplied the A.M.A., *Guides* noting that any atrophy was to be considered a grade modifier of 3. OWCP issued a March 18, 2015 decision finding no entitlement to an additional schedule award, and that an overpayment of $7,734.99 was created as appellant received schedule awards for five percent bilateral upper extremity impairment, but had only two percent permanent impairment of each arm.

In its March 18, 2015 decision, OWCP accorded Dr. Nolan's opinion the weight of the medical evidence. The Board finds, however, that his reports were equivocal in that he failed to clearly determine the degree of sensory deficit, carpal tunnel symptoms, and thenar atrophy. Dr. Nolan also remarked that he could not fully assess appellant's impairments as bilateral thumb arthritis obscured the etiology of the clinical findings. Thus, the probative value of his opinion is diminished by its indefinite character.[17]

Also, Dr. Nolan did not properly explain his use of the A.M.A., *Guides*. According to Table 15-23, normal physical examination findings are equal to grade modifiers of 0 and 1 decreased sensation a grade modifier of 2 while atrophy or weakness constitute a grade modifier of 3. However, Dr. Nolan noted the presence of thenar atrophy bilaterally, but found a grade modifier of 1. It is therefore unclear as to how he arrived at his rating. Thus, the Board finds that Dr. Nolan's report is of diminished probative value as it did not conform to the A.M.A., *Guides*.[18]

The Board therefore finds that OWCP erred in relying on Dr. Nolan's opinion as he did not properly apply the A.M.A., *Guides* and offered equivocal reasoning. Thus, the conflict of

[17] *See Steven S. Saleh*, 55 ECAB 169 (2003).

[18] *Derrick C. Miller*, 54 ECAB 266 (2002).

medical opinion between Dr. Becan and the medical adviser remains unresolved. Therefore, the case must be remanded to OWCP for further development. This development shall include the appointment of a new impartial medical examiner in accordance with 5 U.S.C. § 8123(a) to obtain a report regarding the appropriate percentage of permanent impairment of both upper extremities, according to a correct application of the sixth edition of the A.M.A., *Guides*. After this and any other development deemed necessary, OWCP shall issue an appropriate merit decision in the case.

On appeal, counsel asserts that Dr. Nolan was not properly selected, because OWCP bypassed Dr. Whitaker due to his scheduler's absence. Counsel contends that OWCP should have waited a week and contacted Dr. Whitaker's scheduler. He asserts that even if Dr. Nolan was properly selected, his opinion was insufficient to resolve the conflict because of its equivocal character and misapplication of the A.M.A., *Guides*. Counsel also contends that it was improper for Dr. Magliato to review Dr. Nolan's report as he had also reviewed the case on February 29, 2012 and "was initially called on to resolve the conflict of medical evidence upon his review of Dr. Trager's calculations." Based on the Board's findings herein the Board will not address these arguments.

ISSUES 2 and 3

As the case is not in posture for a decision regarding the appropriate percentage of permanent impairment, the finding of a $7,734.99 overpayment and denial of waiver must be set aside. It is premature for the Board to address the issue of any overpayment of compensation until the proper percentage of permanent impairment is determined.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the appropriate percentage of permanent impairment. The case will be remanded for additional development consistent with this decision and order. The issues of overpayment and waiver are moot.

ORDER

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

Issued: February 9, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board