

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**L.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Southeastern, PA, Employer**

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**Docket No. 16-1788  
Issued: May 15, 2017**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*<sup>1</sup>  
*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On September 7, 2016 appellant, through counsel, filed a timely appeal from a May 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant established that she has more than 16 percent permanent impairment of the right upper extremity and 8 percent permanent impairment of the left upper extremity for which she previously received schedule awards.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

On appeal counsel argues that Dr. William H. Spellman, a Board-certified orthopedic surgeon and referee physician, did not perform a physical examination consistent with requirements of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>3</sup> that he gave a conclusory opinion that was inconsistent with the statement of accepted facts (SOAF), and that he did not reference electrodiagnostic testing. He also asserts that because Dr. Arnold T. Berman, an OWCP medical adviser and Board-certified orthopedist, was part of the conflict in medical evidence, a new OWCP medical adviser should have reviewed Dr. Spellman's reports.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.<sup>5</sup>

On February 16, 2011 OWCP granted appellant a schedule award for 4 percent permanent impairment of the left upper extremity and 13 percent of the right, for accepted conditions of bilateral carpal tunnel syndrome and aggravation of a right wrist TFCC tear. This was affirmed by an OWCP hearing representative on September 1, 2011 and OWCP denied modification by decision dated February 2, 2012. Appellant subsequently appealed to the Board.

By decision dated January 10, 2013, the Board found the case not in posture for decision as a conflict in medical opinion evidence had been created between Drs. Diamond and Slutsky regarding the extent of appellant's bilateral arm impairment. On remand OWCP was to refer appellant to an impartial medical specialist to resolve the conflict, to be followed by a *de novo* decision.<sup>6</sup>

In February 2013 OWCP referred appellant to Dr. Elliot Menkowitz, a Board-certified orthopedic surgeon, for an impartial evaluation. In a February 25, 2013 report, Dr. Menkowitz opined that he agreed with Dr. Slutsky that appellant had 4 percent permanent impairment of the left arm and 13 percent on the right.<sup>7</sup>

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>4</sup> Docket No. 12-1270 (issued January 10, 2013).

<sup>5</sup> Under OWCP File No. xxxxxx600, on March 13, 2009 OWCP accepted that appellant, a mail handler, sustained work-related bilateral carpal tunnel syndrome and aggravation of a right wrist triangular fibrocartilage complex (TFCC) tear. In subsidiary File No. xxxxxx397, a claim for left carpal tunnel syndrome was denied on January 23, 2009. Appellant underwent surgical decompression on the left on July 10, 2009 and on the right on November 17, 2009, and returned to full-time work on June 1, 2010. On November 13, 2010 she filed a schedule award claim (Form CA-7) and submitted a September 7, 2010 report in which Dr. Nicholas Diamond, an attending osteopath, advised that she had 15 percent right arm permanent impairment and 12 percent on the left. In a November 18, 2010 report, OWCP's medical adviser, Dr. Morley Slutsky, Board-certified in occupational medicine, disagreed with Dr. Diamond and found that appellant had 13 percent right arm permanent impairment and 4 percent left arm permanent impairment.

<sup>6</sup> *Supra* note 4.

<sup>7</sup> All physicians who provided impairment evaluations in this case indicated they utilized the sixth edition of the A.M.A., *Guides*.

In reports dated April 7 and May 16, 2013, Dr. Berman, an OWCP medical adviser, noted his review of the record, including Dr. Menkowitz's report. He indicated that appellant had 16 percent right upper extremity permanent impairment and 8 percent on the left. By decision dated May 17, 2013, OWCP granted appellant a schedule award for an additional 4 percent permanent impairment of the left upper extremity impairment and an additional 3 percent on the right, for a total of 8 percent left upper extremity permanent impairment and 16 percent on the right.

Appellant, through counsel, timely requested a hearing with a representative of OWCP's Branch of Hearings and Review. By decision dated August 7, 2013, an OWCP hearing representative found Dr. Menkowitz' report deficient and remanded the case to OWCP to obtain a supplemental report from Dr. Menkowitz or refer appellant for a new referee evaluation. Dr. Menkowitz was unable to complete a new evaluation as he was retiring. OWCP then referred appellant to Dr. Spellman for an impartial evaluation.

In a January 24, 2014 report, Dr. Spellman advised that appellant had 13 percent right arm permanent impairment and 4 percent left arm impairment. He noted that he examined appellant on January 23, 2014. With regard to the right arm, Dr. Spellman utilized Table 15-21, identifying a diagnosis of right median nerve below mid-forearm, and noting that under Table 15-14 she had a level 1 sensory deficit and 0 motor deficit. He found that appellant had a class 1 right upper extremity median nerve impairment of five percent. Dr. Spellman noted that appellant also had an eight percent rating for the TFCC tear of the right wrist. Added to the 5 percent rating for peripheral nerve impairment, appellant had a total 13 percent right arm impairment. For the left arm, Dr. Spellman found a grade modifier of 3 for testing, and modifiers of 1 for history and physical findings, advised that appellant had an adjustment of -1, and concluded that she had four percent permanent impairment.

In an October 12, 2015 supplemental report, Dr. Spellman advised that, based on the information provided, while preexisting bilateral ulnar neuropathy and brachial plexopathy were diagnosed in 2001, she did not have those conditions when examined by him and he did not consider them in his impairment evaluation. As to his analysis of the TFCC tear, he referred to his January 24, 2014 report. Dr. Spellman opined that the TFCC tear and compression of the median nerve at the wrist, while in the same region, had symptoms and functional consequences which were different and, therefore, the impairment values should be added. He concluded that appellant had 13 percent right upper extremity permanent impairment and 4 percent for the left upper extremity.

In a July 8, 2014 report, Dr. Slutsky, OWCP's medical adviser, reviewed the medical record, including Dr. Spellman's reports. He agreed with Dr. Spellman that appellant had four percent left upper extremity permanent impairment for carpal tunnel syndrome. Regarding the right upper extremity, OWCP's medical adviser indicated that appellant had eight percent permanent impairment, due solely to the TFCC tear. He explained that only one diagnosis could be used in a region, and the TFCC tear was the most impairing diagnosis of the right wrist which, under Table 15-3, Wrist Regional Grid, yielded eight percent impairment on the right.<sup>8</sup>

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<sup>8</sup> The A.M.A., *Guides*, Chapter 15 provides that diagnoses in the particular regional grids that may alternatively be rated using the range of motion (ROM) methodology are followed by an asterisk. The diagnosis of TFCC tear is followed by an asterisk.

By decision dated September 12, 2014, OWCP found that appellant was not entitled to additional schedule awards for either the left upper extremity or the right. Appellant, through counsel, timely requested a hearing. In a December 9, 2014 decision, a hearing representative remanded the case to OWCP. He noted that OWCP erred when it referred the case to Dr. Slutsky for review, as he had been on one side of the conflict in medical evidence. The hearing representative further found that OWCP should have obtained a supplemental report from Dr. Spellman regarding his application of the A.M.A., *Guides*.

OWCP thereafter referred the record to Dr. Berman, an OWCP medical adviser for review. In a March 19, 2015 report, Dr. Berman noted his agreement with the upper extremity impairment values found by Dr. Spellman, with January 24, 2012 as the date of maximum medical improvement.

In a decision dated March 30, 2015, OWCP found that appellant was not entitled to a schedule award greater than the 16 percent permanent impairment of the right upper extremity and 8 percent permanent impairment of the left upper extremity previously awarded. Appellant, through counsel, timely requested a hearing.

In a May 27, 2015 decision, an OWCP hearing representative remanded the case to OWCP for clarification from Dr. Spellman. On remand OWCP was to prepare a new SOAF and ask Dr. Spellman to clarify his opinion regarding whether appellant had preexisting bilateral ulnar neuropathy or brachial plexopathy; ask that he acknowledge that he had reviewed the electrodiagnostic studies dated June 25, 2001 and Dr. Scott Fried, an attending osteopath's May 7, 2002 report regarding this issue; ask whether appellant currently has any objective findings to support ongoing bilateral ulnar neuropathy or brachial plexopathy, and specify the supporting evidence for any opinion given;<sup>9</sup> have him explain how the impairment for the claimant's right TFCC tear, carpal tunnel syndrome, brachial plexopathy, and bilateral ulnar neuropathy was calculated, including referencing the specific criteria he used and citing the applicable sections, tables, and pages from the sixth edition of the A.M.A., *Guides*; ask whether he combined two diagnoses in the same region in consideration of the instructions found in section 15.3f on page 419 in the A.M.A., *Guides*; and ask him to comment on the differences in grade modifiers found by Dr. Berman in his March 19, 2015 report. Following this and further development deemed necessary, OWCP was to issue a *de novo* decision.

On remand OWCP forwarded a new SOAF and a set of questions to Dr. Spellman. In correspondence dated June 29, 2015, Dr. Spellman advised that his January 24, 2014 report forwarded to OWCP was an incomplete draft version. These reports are, however, identical other than the reversal of two paragraphs on page four. Each contains identical impairment evaluations.

By decision dated November 18, 2015, OWCP found that appellant was not entitled to an additional schedule award for upper extremity impairments. Appellant, through counsel, timely

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<sup>9</sup> The record includes a number of medical reports that did not include an impairment evaluation. From September 10, 2008 to November 12, 2012, appellant was treated by Dr. A. Lee Osterman, Board-certified in orthopedic and hand surgery. Dr. Fried submitted reports dated May 30, 2001 to March 24, 2016. Findings from electrodiagnostic testing on June 25, 2001 included bilateral brachial plexus neuropathies and ulnar nerve neuropathies at the elbow. Dr. Fried discussed examination findings in these areas on May 7, 2002.

requested a hearing. Appellant was not present at the hearing, held on March 4, 2016. Counsel argued that Dr. Spellman's opinion was insufficient because he did not include a rating for the preexisting ulnar neuropathy and brachial plexopathy and did not fully explain how he reached his impairment conclusions.

In a May 2, 2016 decision, an OWCP hearing representative affirmed the November 18, 2015 decision, finding that Dr. Spellman's supplemental reports corrected deficiencies outlined in the March 30, 2015 decision and was sufficient to carry the weight of the medical evidence.

### **LEGAL PRECEDENT**

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.<sup>10</sup> Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.<sup>11</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>12</sup>

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*" The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>13</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>14</sup>

Under the sixth edition of the A.M.A., *Guides*, entrapment neuropathy, such as carpal tunnel syndrome, is addressed at section 15-4f.<sup>15</sup> Having established the diagnosis of carpal

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<sup>10</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>11</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>12</sup> 20 C.F.R. § 10.404; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>14</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>15</sup> *Supra* note 3 at 432 (6<sup>th</sup> ed. 2009).

tunnel syndrome, the next step in the rating process is to consult Table 15-23, entitled *Entrapment/Compression Neuropathy Impairment*.<sup>16</sup> The table provides a series of grade modifiers from zero to four and a range of corresponding upper extremity impairments from zero to nine percent. Grade modifiers are assigned based on a combination of factors including test findings, history, and physical findings.<sup>17</sup>

### ANALYSIS

The issues on appeal are whether appellant established that she has more than 16 percent permanent impairment of the right arm and 8 percent permanent impairment of the left arm, for which she previously received schedule awards. The accepted conditions in this case are bilateral carpal tunnel syndrome and aggravation of a TFCC tear of the right wrist. Appellant received her schedule awards dated February 16, 2011 and May 17, 2013. OWCP subsequently found that a conflict in medical evidence had been created between Dr. Diamond, an attending osteopath, and Dr. Slutsky, an OWCP medical adviser, and ultimately referred her to Dr. Spellman for an impartial evaluation.

With regard to the left upper extremity diagnosis of carpal tunnel syndrome, the Board finds Dr. Spellman's reports insufficient because he did not fully explain his analysis. In his January 24, 2014 report, Dr. Spellman provided left arm analysis in accordance with Table 15-23 of the A.M.A., *Guides*.<sup>18</sup> He indicated that appellant had test findings modifier of 3, and history and physical findings modifiers of 2 each. Dr. Spellman then averaged the grade modifiers, finding a grade modifier of 2, and chose the default value of five percent. He then found an adjustment of -1, which yielded a total left upper extremity impairment of four percent. However, Dr. Spellman failed to explain the basis of this adjustment. As noted, section 15.4 of the A.M.A., *Guides* provides the method of evaluation upper extremity entrapment neuropathy.<sup>19</sup> The rating process, utilizing Table 15-23, is described on pages 448 and 449 of the A.M.A., *Guides*. This indicates that to modify a default value, a functional scale grade should be used. Dr. Spellman did not explain how he applied a functional scale score to adjust appellant's left upper extremity impairment rating by -1. Furthermore, he merely mentioned that an eight percent rating for the TFCC tear had previously been accepted without providing an impairment evaluation of this condition.

OWCP procedures provide that, where the case has been referred for an independent medical evaluation to resolve a conflict as to the issue of permanent impairment, it is necessary to route the file to a new OWCP medical adviser to review the calculations to ensure that the referee physician appropriately used the A.M.A., *Guides*.<sup>20</sup> Where a referee examination is arranged to resolve a conflict created between a claimant's physician and OWCP's medical

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<sup>16</sup> *Id.* at 448-49.

<sup>17</sup> Additional grade modifications are permitted using the *QuickDASH* (Disabilities of the Arm, Shoulder, and Hand) functional assessment tool.

<sup>18</sup> *Supra* note 12 at 449.

<sup>19</sup> *Id.* at 432-50.

<sup>20</sup> *See supra* note 10 at Chapter 2.808.6(g) (February 2013).

adviser with respect to a schedule award issue, the same OWCP medical adviser should not review the referee's report for proper application of the A.M.A., *Guides*.<sup>21</sup> In this case, after receipt of Dr. Spellman's supplemental report dated October 12, 2015, the record was not forwarded to an OWCP medical adviser for review. For these reasons the case is not in posture for decision regarding appellant's left arm impairment, and the case must be remanded to OWCP. On remand, OWCP should obtain a supplemental report from Dr. Spellman or refer her to a new referee physician for a comprehensive impairment rating of appellant's left upper extremity. After this and such further development deemed necessary, OWCP shall issue a *de novo* decision regarding the extent of appellant's left upper extremity permanent impairment.

As to the right upper extremity, the Board also finds that the case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the diagnosis-based impairment (DBI) or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.<sup>22</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>23</sup> In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.<sup>24</sup>

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment.

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the May 2, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an additional right upper extremity schedule award.

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<sup>21</sup> *Id.*

<sup>22</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>23</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>24</sup> *Supra* note 22.

Lastly, with regard to the assertion on appeal that Dr. Berman had been part of the conflict in medical evidence, the conflict was established between Dr. Slutsky and Dr. Diamond. Moreover, as Dr. Spellman found no physical examination evidence of brachial plexus neuropathy or ulnar neuropathy on his examination, it was unnecessary for him to include these in his impairment rating.

**CONCLUSION**

The Board finds this case not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 2, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: May 15, 2017  
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