

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

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**D.P., Appellant**

**and**

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

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**Docket No. 16-1908  
Issued: May 22, 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  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 29, 2016 appellant, through counsel, filed a timely appeal from a June 30, 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 to consider the merits of this case.

**ISSUE**

The issue is whether appellant has established more than nine percent permanent impairment of the right upper extremity, for which she previously received a schedule award.

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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 there is an unresolved conflict in the medical opinion evidence.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts of the case as presented in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On March 16, 2003 appellant, then a 51-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that on February 3, 2003 she first realized her carpal tunnel syndrome was due to continuous typing. OWCP accepted the claim for right carpal tunnel syndrome. Appellant received compensation on the supplemental rolls from February 4 to 27, 2003. OWCP subsequently expanded the acceptance of the claim to include right ulnar nerve compression. Appellant underwent neurolysis of the right wrist medial and ulnar nerves on July 15, 2005.<sup>4</sup>

Appellant filed a claim for a schedule award (Form CA-7) and submitted an impairment evaluation dated September 13, 2011 from Dr. Arthur Becan, an orthopedic surgeon, who noted appellant's employment and medical history. He noted that electromyogram (EMG) testing dated February 22, 2003 and October 14, 2004 showed abnormalities in the carpal tunnel. Dr. Becan diagnosed right carpal tunnel syndrome, status post right carpal tunnel release, right elbow ulnar neuropathy, and status post right wrist ulnar nerve neurolysis. On physical examination he noted a positive Tinel's sign along the right elbow ulnar nerve, restricted right elbow range of motion, pain on flexion and extension, right wrist palmar tenderness, positive right wrist Tinel's and Phalen's signs, restricted right wrist range of motion, and pain on palmar flexion, ulnar deviation, and dorsiflexion. Dr. Becan determined that appellant had a *QuickDASH* disability/symptom score of 79 percent. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he concluded that appellant had 11 percent right upper extremity permanent impairment. Using Table 15-23,<sup>5</sup>

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<sup>3</sup> Docket No. 10-2399 (issued September 28, 2011), denying petition for reconsideration (issued May 25, 2012). The Board also issued an order denying appellant's request for an oral argument under Docket No. 10-2399 on May 25, 2012. Docket No. 15-0318 (issued September 8, 2015).

<sup>4</sup> On July 27, 2006 appellant alleged a recurrence of disability (Form CA-2a) commencing July 5, 2006. OWCP accepted this notice of recurrence of disability by decision dated October 16, 2006. Appellant received compensation on the supplemental rolls from July 5, 2006 until May 12, 2007. She thereafter received compensation on the periodic rolls from May 13, 2007 until September 27, 2008. Appellant returned to work in a full-time limited-duty position on October 3, 2008. She again alleged a recurrence of disability commencing October 23, 2008. OWCP denied this recurrence claim on April 9, 2009. Following further development, including referral to an impartial medical examiner, OWCP again denied this recurrence claim on December 2, 2009. On September 27, 2010 appellant filed an appeal to the Board. On September 28, 2011 the Board remanded this case for OWCP to clarify the selection of the impartial medical examiner. Docket No. 10-2399, (issued September 28, 2011). OWCP thereafter terminated appellant's compensation benefits effective February 6, 2013. On November 25, 2014 appellant filed an appeal to the Board. On September 8, 2015 the Board affirmed the termination of appellant's compensation benefits, however the Board found that the case was not in posture for decision as to whether appellant had continuing residuals or disability causally related to the accepted injury. Docket No. 15-0318 (issued September 8, 2015). On January 30, 2017 OWCP found that appellant had not established continuing residuals or disability. This decision is not the subject of the current appeal.

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

Dr. Becan assigned a grade modifier of 3 for test findings, a grade modifier of 3 for history, a grade modifier of 3 for physical examination findings based on decreased pinch, which totaled 9, averaged 3 and resulted in an eight percent right upper extremity permanent impairment. He noted using Table 15-7.<sup>6</sup> Her *QuickDASH* score was 79 for functional history which resulted in eight percent right upper extremity permanent impairment. Next, Dr. Becan used Table 15-23<sup>7</sup> to determine the impairment rating for appellant's right elbow ulnar nerve entrapment neuropathy. He assigned a grade modifier of 1 for test findings, a grade modifier of 3 for history, and a grade modifier of 2 for physical examination findings of decreased sensory. Using the *QuickDASH* score of 79 percent in functional history increased the impairment to 6 percent, which was decreased by 50 percent due to the second compression neuropathy, resulting in a total of 3 percent permanent impairment. Combining the impairment for the right wrist median nerve entrapment neuropathy and right elbow ulnar nerve entrapment neuropathy resulted in a total of 11 percent right upper extremity impairment.

By letter dated August 9, 2012, OWCP requested that Dr. John R. Donahue, a Board-certified orthopedic surgeon and independent medical examiner, to assess appellant's right upper extremity permanent impairment using the sixth edition of the A.M.A., *Guides*.

In a September 17, 2012 report, Dr. Donahue detailed the reports and objective tests he reviewed. Appellant's physical examination revealed negative elbow Tinel's sign; negative bilateral Spurling's test; normal pinch strength; normal wrist and elbow extension, abduction, adduction, and flexion; no evidence of thenar eminence weakness; full bilateral shoulders, wrist, elbows, and hand range of motion without pain; normal strength and stability; and unremarkable reflex, motor, and sensory examination although appellant complained of variable right arm tingling. He further observed that the physical examination revealed no evidence supporting any ongoing ulnar nerve compression or carpal tunnel syndrome and that she could return to her regular duty without restrictions.

By decision dated October 1, 2012, based on Dr. Donahue's report, OWCP denied appellant's claim for a schedule award as there was no evidence of any permanent impairment due to the accepted conditions.

By letter dated October 4, 2012, counsel requested an oral hearing before an OWCP hearing representative, which was held on January 30, 2013.

Subsequent to the hearing appellant submitted a December 11, 2012 report from Dr. Stanton A. Bree, an examining osteopath and Board-certified physiatrist, and a February 11, 2013 report from Dr. Scott Fried, a treating Board-certified osteopathic orthopedic surgeon.

In a December 11, 2012 report, Dr. Bree noted that he had examined appellant on that day and had conducted motor and sensory conduction studies, as well as an EMG examination. Based on these studies, he diagnosed mild right wrist median neuropathy, moderate left wrist neuropathy, and mild right C5 radiculopathy. A motor conduction study revealed right median

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<sup>6</sup> *Id.* at 406, Table 15-7.

<sup>7</sup> *Supra* note 5.

nerve prolonged distal latency, normal conduction velocity and normal amplitude, and right ulnar nerve above and below the elbow normal amplitude, distal latency, and conduction velocity. A sensory examination revealed normal right ulnar nerve latency and amplitude.

In a February 11, 2013 report, Dr. Fried noted the history of appellant's employment injury, her work history, and the medical care she had received. He disagreed with Dr. Donahue's opinion as his report did not contain any documentation that "standard neurologic testing for carpal tunnel or brachial plexus involvement in either upper extremity" was performed. Dr. Fried diagnosed bilateral flexor tenosynovitis, bilateral radial neuropathy at the radial tunnel, brachial plexitis, carpal tunnel median neuropathy due to work activities, and right Raynaud's *versus* White hand syndrome. He related that objective testing in the form of EMG examination and nerve conduction studies showed that appellant continued to have residuals of right carpal tunnel syndrome as well as "[p]roximal involvement at the brachial plexus" and radial and ulnar nerve involvement.

By decision dated May 30, 2013, an OWCP hearing representative set aside the October 1, 2012 decision denying appellant's claim for a schedule award. He found further development of the medical evidence was required.

By letter dated September 13, 2013, OWCP requested Dr. Donahue provide a supplemental report following review of the new evidence of record.

In a supplemental report dated October 3, 2013, Dr. Donahue, based on a review of a December 11, 2012 EMG report by Dr. Bree, and a February 11, 2013 report from Dr. Fried, reiterated his conclusion that appellant had no residuals or disability due to her accepted conditions. He noted that he had "inadvertently left out the negative Tinel's and Phalen's sign" on the examination of appellant's right wrist. Dr. Donahue related that he found no evidence of carpal tunnel syndrome either clinically or objectively and that the condition had been surgically corrected. He found no permanent impairment using the A.M.A., *Guides*.

In a November 12, 2013 report, OWCP's medical adviser reviewed the evidence relevant to appellant's schedule award claim. He noted that "[m]ultiple EMG studies have demonstrated significant distal latencies in the carpal tunnel" including the most recent study of December 11, 2012." Based on review of this objective evidence, the medical adviser opined that there was "definite abnormality in regard to the EMG study." He disagreed with Dr. Donahue's finding that there was no permanent impairment. Using Dr. Becan's examination findings and the A.M.A, *Guides*, he determined that appellant had nine percent right upper extremity permanent impairment. The medical adviser determined the date of maximum medical improvement (MMI) was September 11, 2011, the date of Dr. Becan's report.

By decision dated November 26, 2013, OWCP granted appellant a schedule award for nine percent permanent impairment of the right upper extremity.

By letter dated December 3, 2013, counsel requested an oral hearing before an OWCP hearing representative. A hearing was held on May 22, 2014.

By decision dated August 21, 2014, OWCP's hearing representative set aside the November 26, 2013 schedule award determination. She found that Dr. Donahue's report was

insufficient to determine appellant's impairment rating as it failed to correctly apply the A.M.A., *Guides*. The hearing representative found that as OWCP had undertaken development of the evidence by referral to a second opinion physician that it had an obligation to secure a report resolving the issue in question. As Dr. Donohue's reports were insufficient to resolve the issue of appellant's impairment, OWCP should have referred appellant for another second opinion evaluation. The hearing representative then remanded the case to OWCP for referral to a proper specialist to make an impairment determination using the sixth edition of the A.M.A., *Guides*.

On July 28, 2015 OWCP referred appellant for a second opinion evaluation with Dr. F. Draper, Jr., a Board-certified orthopedic surgeon, for a determination of appellant's right upper extremity impairment.

In an August 13, 2015 report, Dr. Draper noted appellant's medical history. He related that examination of her right elbow revealed flexion of 150 degrees, elbow extension lag of 0 degrees, forearm supination of 85 degrees, and forearm pronation was 80 degrees. Physical examination findings for right wrist revealed extension of 60 degrees, flexion of 60 degrees, ulnar deviation of 40 degrees, and radial deviation of 30 degrees. The fingers of the right hand showed range of motion for the distal interphalangeal joint for the index, middle, ring, and little finger of 70 degrees, range of motion for the proximal interphalangeal joint for the index, middle, ring, and little finger of 100 degrees, and the range of motion for the metacarpophalangeal joint for the index, middle, ring, and little finger of 90 degrees. Dr. Draper noted a slight positive Tinel's sign over the right elbow ulnar nerve and a negative Tinel's sign over the right wrist ulnar nerve and right elbow median nerve, and grip strength was +5.5 for the right hand. He related that appellant had normal light touch at the tip of the right index and little finger. Dr. Draper explained that her diagnoses included right carpal tunnel syndrome, status post 2005 right carpal tunnel release, and mild right elbow ulnar nerve entrapment syndrome. He calculated appellant's impairment rating for right bilateral carpal tunnel syndrome and right ulnar nerve entrapment syndrome under Table 15-2,<sup>8</sup> of the A.M.A., *Guides* for peripheral nerve impairment. Using the table for right median nerve, he noted a grade modifier for test findings of 1, a grade modifier for physical examination of 2 and a grade modifier for history of 2 for a total of 5 which he divided by 3 to arrive at 1.66 or four percent impairment for grade 1. Dr. Draper then calculated appellant's impairment for right ulnar nerve and noted a grade modifier for test findings of 0, a grade modifier for physical examination of 0 and a grade modifier for history of 1 for a total of 1 which he divided by 3 to arrive at 0.33 or 0 percent for a grade 0. Lastly, Dr. Draper combined the impairment ratings for the right median nerve and right ulnar nerve to arrive at a total four percent right upper extremity permanent impairment.

Dr. Draper, in a supplemental report dated November 9, 2015, determined the date of MMI to be July 15, 2006, which he noted was one year following right carpal tunnel release surgery on July 15, 2005.

By decision dated December 17, 2015, OWCP denied appellant's request for an additional schedule award.

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<sup>8</sup> *Supra* note 5 at Table 15-2.

By letter dated December 29, 2015, counsel requested an oral hearing before an OWCP hearing representative. This hearing was held on April 11/2016.

By decision dated June 30, 2016, an OWCP hearing representative affirmed the December 17, 2015 decision denying appellant's claim for an additional schedule award. The hearing representative found the weight of the medical opinion evidence rested with Dr. Draper's August 13, 2015 report.

### **LEGAL PRECEDENT**

Under section 8107 of FECA<sup>9</sup> and section 10.404 of the implementing federal regulations,<sup>10</sup> schedule awards are payable for permanent impairment of specified body members, functions, or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates 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 the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>11</sup>

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).<sup>12</sup> Under the sixth edition, the evaluator identifies the impairment class 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).<sup>13</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>14</sup>

The A.M.A., *Guides* notes that, when impairment results strictly from a peripheral nerve lesion, no other rating method is applied to this section (15.4 Peripheral Nerve Impairments) to avoid duplication or unwarranted increases in the impairment estimation.<sup>15</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and

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<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

<sup>11</sup> *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>12</sup> A.M.A., *Guides* 3 (6<sup>th</sup> ed., 2009), section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>13</sup> *Id.* at 383-419.

<sup>14</sup> *Id.* at 411.

<sup>15</sup> A.M.A., *Guides* 423 (note that peripheral nerve impairment may be combined with diagnosis-based impairments (DBI) at the upper extremity as long as the DBI does not encompass the nerve impairment. *Id.* at 419.

percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.<sup>16</sup>

### ANALYSIS

OWCP accepted that appellant sustained right carpal tunnel syndrome and right ulnar nerve compression. On December 15, 2011 appellant filed a claim for a schedule award. By decision dated November 26, 2013, OWCP granted appellant a schedule award for nine percent right upper extremity permanent impairment with September 13, 2011 as the date of MMI. By decision dated August 21, 2014, the hearing representative set aside the November 26, 2013 schedule award determination and remanded the case for referral to a proper specialist to make an impairment determination using the sixth edition of the A.M.A., *Guides*. On remand, OWCP referred appellant to Dr. Draper for a second opinion evaluation. Dr. Draper diagnosed right carpal tunnel syndrome, status post 2005 right carpal tunnel release, and mild right elbow ulnar nerve entrapment syndrome. He reviewed the medical and evidence and provided examination findings. Dr. Draper applied the A.M.A., *Guides* and concluded that appellant had four percent right upper extremity impairment due to her accepted right carpal tunnel and right elbow ulnar nerve entrapment syndrome and that the date of MMI was July 15, 2006. By decision dated December 17, 2015, OWCP denied appellant's request for an additional schedule award based on Dr. Draper's report, which was affirmed by a hearing representative on June 30, 2016.

After OWCP received the report from Dr. Draper, if the claims examiner determined that the case was in posture for a schedule award determination, the case should have been referred to a DMA for review. OWCP's procedures specifically provide: "The [c]laims [e]xaminer (CE) will ask the [d]istrict [m]edical [a]dviser (DMA) to evaluate a case when it appears to be in posture for schedule award determination. The DMA is responsible for reviewing the file, particularly the medical report on which the award is to be based, and then calculating the award."<sup>17</sup>

On appeal counsel contends there is a discrepancy in the medical opinion evidence regarding appellant's impairment rating between Dr. Becan, appellant's examining physician, and Dr. Draper, a second opinion physician. The Board notes that Dr. Becan in his September 13, 2011 report found that appellant had 11 percent permanent impairment of the right upper extremity. In assessing appellant's impairment for right carpal tunnel syndrome, Dr. Becan assigned grade modifiers of 3, for test findings, history, and physical examination findings. While assessing appellant's ulnar nerve entrapment neuropathy he assigned a grade modifier of 1 for test results, a grade modifier of 3 for history, and a grade modifier of 2 for physical examination findings. Based upon Dr. Becan's findings OWCP's medical adviser found in his November 12, 2013 report that appellant had nine percent permanent impairment of the right upper extremity. OWCP thereafter granted appellant a schedule award for nine percent permanent impairment of the right upper extremity. Dr. Draper, however, concluded in his

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<sup>16</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013). See *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010).

August 13, 2015 report that appellant only had four percent permanent impairment of the right upper extremity. He evaluated appellant's impairment under the Tables for right median and right ulnar nerve. Dr. Draper assigned grade modifiers lower than those of Dr. Becan. For example, in rating appellant's right ulnar nerve impairment he assigned a grade modifier of 0 for test findings, a grade modifier of 0 for physical examination and a grade modifier of 1 for history. Dr. Draper, however, related that appellant had reached MMI in 2006, years prior to Dr. Becan's evaluation.

Reinforcing the requirement for DMA review of a schedule award claim, OWCP procedures also provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.<sup>18</sup> OWCP accepted Dr. Draper's examination findings in denying appellant's request for an additional schedule award. Dr. Draper's examination findings suggest that appellant's condition may have improved since Dr. Becan's evaluation, if OWCP believed that all necessary medical evidence was now of record, it was incumbent on the claims examiner to request that OWCP's medical adviser review the record. The facts of this case remain unclear as to whether appellant's condition improved after 2011, or if MMI occurred in 2006.

Dr. Draper's report was not forwarded to an OWCP medical adviser for review and thus it did not comply with its procedures. For this reason, the Board will set aside the June 30, 2016 decision and remand the case to OWCP. On remand, OWCP should have a medical adviser evaluate Dr. Draper's August 13 and November 9, 2015 reports and provide an opinion concerning the extent of appellant's impairment in accordance with the A.M.A., *Guides*. After such further development as may be necessary, it shall render a *de novo* decision.

### CONCLUSION

The Board finds this case not in posture for decision.

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<sup>18</sup> See Federal (FECA) Procedure Manual, *supra* note 16 at Chapter 2.808.6(f) (February 2013); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *M.R.*, Docket No. 13-1279 (issued December 5, 2013); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).



**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 30, 2016 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 22, 2017  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board