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

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| **C.S., Appellant** | ) | |
| **and** | ) | **Docket No. 19-0731** |
| | ) | **Issued: August 22, 2019** |
| **U.S. POSTAL SERVICE, POST OFFICE, Nashua, NH, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.,* for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On February 20, 2019 appellant, through counsel, filed a timely appeal from a January 22, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 has met her burden of proof to establish permanent impairment of her upper extremities warranting a schedule award.

[1] 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.

[2] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On April 14, 1997 appellant, then a 34-year-old data conversion operator, filed an occupational disease claim (Form CA-2) alleging that she sustained carpal tunnel syndrome and right hand and wrist pain due to repetitive keying at a display terminal while in the performance of duty. She noted that she first became aware of her claimed condition and realized its relation to her federal employment on April 12, 1997. Appellant stopped work on April 14, 1997 and did not return. OWCP accepted the claim for bilateral carpal tunnel syndrome (CTS). It paid appellant wage-loss compensation for total disability on the daily compensation rolls beginning April 14, 1997 and on the periodic compensation rolls beginning January 13, 2000.

An electromyogram and nerve conduction velocity study (EMG/NCV) dated October 27, 1997 revealed bilateral mild median neuropathy of the wrists. An August 18, 1998 EMG/NCV study demonstrated bilateral mild median neuropathy of the wrists.

On December 1, 1997 appellant underwent a left carpal tunnel release. On February 18, 1999 she underwent a right carpal tunnel release with epineurectomy and flexor tenosynovectomy.

In a report dated January 30, 2014, Dr. Steven A. Silver, a Board-certified orthopedic surgeon, found subjective sensation loss in the fingers and thumbs bilaterally with a negative Tinel's sign, but increased numbness in the bilateral long and ring fingers with palmar flexion. He noted that she had a "somewhat equivocal Phalen's sign" that did not correspond to a median nerve distribution. In an April 15, 2014 addendum, Dr. Silver opined that appellant had no residuals of her accepted employment injury.

By decision dated August 26, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective September 21, 2014. It found that the weight of the evidence established that she had no further residuals or disability causally related to her accepted employment injury.

On September 4, 2014 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated April 15, 2015, OWCP's hearing representative affirmed the August 26, 2014 decision. She found that the opinion of Dr. Silver represented the weight of the evidence and established that she had no further residuals or disability due to her bilateral CTS.

Appellant filed a claim for a schedule award (Form CA-7).

In an impairment evaluation dated June 29, 2016, Dr. Byron V. Hartunian, an orthopedic surgeon, reviewed appellant's history of bilateral CTS treated with surgery. On examination he found a mildly positive Tinel's sign and Phalen's test bilaterally and a loss of sensation of the thumb, index, middle and radial half of the ring finger. Dr. Hartunian found good motor function and grip and pinch strength. He diagnosed status post bilateral releases for CTS with residual compression neuropathy. Dr. Hartunian opined that appellant had reached maximum medical improvement (MMI) in 2000. Referencing Table 15-23 on page 449 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A.,

*Guides*),[3] he found a grade modifier of 2 for functional history due to pain with normal activity. Dr. Hartunian further found a grade modifier of 2 for physical findings of decreased sensation of the median nerve and a grade modifier of 1 for clinical studies showing a nerve conduction delay, which yielded an average grade modifier of 2 and a default upper extremity impairment rating of five percent. He applied appellant's *Quick*DASH (disabilities of the arm, shoulder, and hand) score of 41 to 60 and concluded that appellant had six percent permanent impairment of each upper extremity.

On March 13, 2017 Dr. Herbert White, Jr., Board-certified in occupational medicine and serving as a district medical adviser (DMA), reviewed the medical evidence and identified the diagnosis as entrapment/compression neuropathy. Using Table 15-23 on page 449 of the A.M.A., *Guides*, he found a grade 1 modifier for test findings showing a sensory conduction delay, a grade 2 modifier for a history of intermittent significant symptoms, and a grade 2 modifier of physical findings of decreased sensation. Dr. White averaged the grade modifiers to find a default value of five percent, which he found unchanged after application of the *Quick*DASH score of 41-60 according to Table 15-7 on page 406 of the A.M.A., *Guides*. He opined that appellant had five percent permanent impairment of each upper extremity.

OWCP referred appellant to Dr. Kenneth Polivy, a Board-certified orthopedic surgeon, for a second opinion examination regarding the extent of any permanent impairment of the upper extremities.

In a report dated June 28, 2018, Dr. Polivy discussed appellant's history of bilateral CTS and reviewed the medical evidence of record. On examination he measured full range of motion with no weakness in the biceps or triceps in either upper extremity. Dr. Polivy found subjectively decreased sensation in the left ulnar nerve distribution of the hand, pain with palpation of the carpometacarpal (CMC) joint, tenderness of the proximal interphalangeal (PIP) joint, and a negative Tinel's sign and Phalen's test. He opined that appellant had no findings of median neuropathy on examination and that her symptoms were "consistent with CMC joint arthritis at the present time, which is a non-occupational injury." Dr. Polivy asserted that she had no residuals of her bilateral CTS and thus no permanent impairment, noting that he disagreed with Dr. Hartunian's findings on examination of a positive Tinel's sign and Phalen's test. He diagnosed CMC and PIP joint arthritis unrelated to appellant's employment.

By decision dated July 13, 2018, OWCP denied appellant's claim for a schedule award, finding that there was no employment-related permanent upper extremity impairment.

On July 20, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on November 28, 2018. Counsel questioned why OWCP had referred appellant for a second opinion examination given the near agreement of her attending physician and the DMA regarding her extent of impairment. He maintained that a conflict existed in medical evidence.

[3] A.M.A., *Guides* (6th ed. 2009).

By decision dated January 22, 2019, OWCP's hearing representative affirmed the July 13, 2018 decision. He found that Dr. Polivy's opinion represented the weight of the evidence and established that appellant had no permanent impairment of either upper extremity.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.[6] 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.[7]

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).[8] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

Impairment due to CTS is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[12] In Table 15-23, grade modifier levels (ranging from zero to four) are described for the categories of test findings, history, and physical findings. The grade modifier levels are averaged to arrive at

[4] *Supra* note 2.

[5] 20 C.F.R. § 10.404.

[6] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[7] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[8] A.M.A., *Guides* 3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] *Id*. at 494-531.

[10] *Id*. at 411.

[11] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

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

the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down based on functional scale, an assessment of impact on daily living activities (*Quick*DASH).[13]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[14] For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.[15]

## ***ANALYSIS***

The Board finds that the case is not in posture for decision due to a conflict in medical opinion.

In a June 29, 2016 impairment evaluation, Dr. Hartunian found a positive Tinel's sign and Phalen's test on examination and a loss of sensation in the thumb, index, middle, and half of the ring finger. He determined that, according to Table 15-23 on page 449 of the A.M.A., *Guides*, appellant had a grade modifier of 2 for functional history due to pain with normal activity, a grade modifier of 2 for physical findings of decreased median nerve sensation, and a grade modifier of 1 for clinical studies showing a nerve conduction delay, which yielded an average grade modifier of 2 and a default upper extremity impairment rating of five percent due to entrapment neuropathy. Dr. Hartunian adjusted the default impairment rating up based on her *Quick*DASH score to find six percent permanent impairment of each upper extremity.

Dr. White, a DMA, reviewed Dr. Hartunian's report and advised that appellant had five percent permanent impairment. He concurred with Dr. Hartunian's impairment rating except for his application of the *Quick*DASH score, which he found yielded no change from the default impairment value.

On June 28, 2018 Dr. Polivy, an OWCP referral physician, found that appellant had a negative Tinel's sign and Phalen's test bilaterally with subjectively decreased sensation in the left ulnar nerve distribution at the CMC and PIP joints. He opined that she had no residuals of her bilateral carpal tunnel syndrome. Dr. Polivy found that appellant had no permanent impairment due to carpal tunnel syndrome, asserting that he disagreed with Dr. Hartunian's findings on physical examination.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.[16] The Board finds that there is a conflict in medical opinion between Dr. Hartunian and Dr. Polivy regarding whether appellant has objective findings of carpal tunnel syndrome causing a permanent impairment of the upper extremities.[17] Therefore, the case must

[13] *Id*. at 448-49.

[14] 5 U.S.C. § 8123(a); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019).

[15] *See A.G., id.*

[16] *See supra* note 13; *see also G.W.*, Docket No. 19-0063 (issued June 21, 2019).

[17] *See K.E.*, 17-0863 (issued October 5, 2017); *S.W.*, Docket No. 17-0801 (issued July 14, 2017).

be remanded to OWCP for referral of appellant to an impartial medical examiner for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).[18] After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

## ***CONCLUSION***

The Board finds that the case is not in posture for decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 22, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 22, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[18] *Id*.