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

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| **D.S., Appellant** | ) | |
| **and** | ) | **Docket No. 19-0292** |
| | ) | **Issued: June 21, 2019** |
| **GENERAL SERVICES ADMINISTRATION, NORTHEAST DISTRIBUTION CENTER, Burlington, NJ, Employer** | ) | |

*Appearances:*
*Thomas R. Uliase, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On November 20, 2018 appellant, through counsel, filed a timely appeal from a June 5, 2018 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.

[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.*

## ***ISSUE***

The issue is whether appellant has met his burden of proof to establish greater than five percent permanent impairment of each upper extremity, for which he previously received schedule award compensation.

## ***FACTUAL HISTORY***

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 5, 1999 appellant, then a 40-year-old materials handler, filed an occupational disease claim (Form CA-2) for carpal tunnel syndrome, which he attributed to factors of his federal employment. On November 26, 1999 OWCP initially accepted his claim for left carpal tunnel syndrome. It also authorized a left carpal tunnel release, which was performed on October 2, 2001.[4] OWCP subsequently expanded the acceptance of appellant's claim to include neck sprain, brachial neuritis, and right carpal tunnel syndrome.[5]

On June 6, 2003 appellant filed a claim for a schedule award (Form CA-7).

On November 9, 2005 OWCP granted appellant a schedule award for five percent permanent impairment for each upper extremity. The period of the award ran for 31.20 weeks from October 30, 2005 to June 5, 2006.

Appellant disagreed with the schedule award and filed various requests for a hearing. By decisions dated March 21, 2006, November 16, 2007, July 29, 2008, and December 13, 2010, designated OWCP hearing representatives remanded the case for referral to an impartial medical specialist in order to resolve a conflict in medical opinion evidence between Dr. David Weiss, appellant's treating physician, and OWCP's second-opinion examiner and district medical adviser (DMA), regarding whether appellant had additional permanent impairment of either upper extremity.

OWCP ultimately referred appellant to Dr. Michael Silverstein, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion.[6] Dr. Silverstein concluded in a November 16, 2011 report that appellant had no permanent upper extremity impairment.

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[3] Docket No. 13-0029 (issued April 3, 2013).

[4] Appellant had previously undergone a right carpal tunnel release on March 31, 1998.

[5] The present claim was assigned OWCP File No. xxxxxx816. Under OWCP File No. xxxxxx178 appellant has an accepted traumatic injury claim for neck sprain and brachial neuritis, which arose on December 1, 2000. OWCP File Nos. xxxxxx816 and xxxxxx178 have been administratively combined, with File No. xxxxxx816 serving as the master file.

[6] OWCP referred appellant to Dr. Silverstein following several failed attempts in resolving the conflict in medical opinion evidence.

By decision dated June 26, 2012, OWCP denied appellant's claim for an additional schedule award, finding that the special weight of the medical opinion evidence rested with the opinion of Dr. Silverstein and established that appellant had no more than five percent permanent impairment of each upper extremity for which he had previously received schedule award compensation.

On September 25, 2012 appellant filed an appeal to the Board. By decision dated April 3, 2013,[7] the Board set aside OWCP's June 26, 2012 decision, finding that the case was not in posture for a decision. The Board determined that the November 16, 2011 impartial medical report of Dr. Silverstein[8] was based on an incomplete history, and accordingly, was insufficient to resolve the conflict in medical opinion evidence. The Board remanded the case to OWCP and instructed it to provide him with all available diagnostic testing and obtain a supplemental report with an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[9]

Following the Board decision, OWCP obtained and received supplemental reports dated May 20 and July 3, 2013 from Dr. Silverstein. Dr. Silverstein reviewed a June 6, 2013 electromyography (EMG) and nerve conduction velocity (NCV) study and opined that appellant had zero permanent impairment due to normal test findings, normal physical examination findings, and mild intermittent symptoms.[10]

By decision dated August 28, 2013, OWCP denied appellant's claim for an additional schedule award. In a decision dated March 20, 2014, an OWCP hearing representative found Dr. Silverstein's reports insufficient to resolve the conflict in medical opinion evidence and remanded the case for another referee evaluation to resolve the conflict of medical opinion regarding greater impairment due to all of appellant's accepted employment-related conditions.

In a May 7, 2014 report, Dr. David Feldman, a Board-certified anesthesiologist and impartial medical examiner, reviewed appellant's history and provided examination findings of his bilateral upper extremities and cervical spine. He noted that appellant's accepted cervical sprain injury had resolved and, therefore, had no ratable impairment due to his neck condition. Dr. Feldman referenced Table 15-23, page 449, of the A.M.A., *Guides* and opined that appellant had five percent permanent impairment of the left upper extremity and two percent permanent impairment of the right upper extremity for a total of seven percent permanent impairment of the bilateral upper extremities.

[7] *Supra* note 3.

[8] In an impartial medical examination report dated November 16, 2011, Dr. Silverstein noted that he did not have the EMG results dated December 27, 1999 to February 28, 2008. He conducted an examination and determined that appellant had zero percent permanent impairment of both upper extremities in accordance with the sixth edition of the A.M.A., *Guides.*

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

[10] A June 6, 2013 bilateral upper extremity EMG/NCV study showed motor examination of the median and ulnar nerves within normal limits, sensory examination was borderline normal, and needle examination was normal except for the left abductor pollicis.

By decision dated July 17, 2014, OWCP denied appellant's requests for an additional schedule award. By decision dated March 18, 2015, an OWCP hearing representative set aside the July 17, 2014 decision and remanded the case for a DMA to review Dr. Feldman's May 7, 2014 impartial medical report.

In an April 21, 2015 report, the DMA concurred with Dr. Feldman's impairment rating of five percent permanent impairment of the left upper extremity and two percent permanent impairment of the right upper extremity.

On January 25, 2016 appellant underwent an EMG/NCV study, which showed motor and sensory nerve testing within normal limits. The study also indicated evidence of ongoing and chronic left C6-7 radiculopathy, "likely the result of [appellant's] March 31, 1998 work injury."

In a decision dated April 13, 2016, OWCP again denied appellant's claim for additional schedule award compensation. By decision dated November 21, 2016, an OWCP hearing representative set aside the April 13, 2016 decision, finding that Dr. Feldman's impairment rating was not based on an accurate factual background. The hearing representative remanded the case for OWCP to update its statement of accepted facts (SOAF) to include the accepted condition of brachial neuritis and for Dr. Feldman to provide a supplemental report on appellant's impairment rating due to appellant's upper extremity conditions and any ongoing cervical symptoms.

OWCP issued an updated SOAF dated February 1, 2017 and referred appellant to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict in medical opinion regarding appellant's impairment rating.[11] The SOAF indicated that appellant's claim was accepted for bilateral carpal tunnel syndrome, neck sprain, and cervical radiculopathy.

In an August 29, 2017 report, Dr. Didizian discussed appellant's medical history, reviewed the February 1, 2017 SOAF, and diagnostic testing. He noted that the most recent EMG study dated January 25, 2016 showed chronic left C6-7 radiculopathy and normal motor and sensory nerve testing. Dr. Didizian provided findings on physical examination and reported that there was no evidence of neck sprain or cervical radiculopathy. He noted that appellant's motor, sensory, and reflex systems in the upper extremities were intact for any cervical root involvement. Dr. Didizian also reported that there was no evidence on clinical examination of brachial plexopathy, left ulnar neuropathy, or bilateral radial neuropathy. He explained that the January 25, 2016 EMG study had no meaning without clinical correlation. Dr. Didizian opined that appellant's ongoing neck complaints were due to appellant's preexisting degenerative disc disease. He concluded that there was no evidence of chronic left C6-7 radiculopathy and that appellant had no impairment rating due to his cervical spine.

Upon examination of appellant's bilateral upper extremities, Dr. Didizian noted that Tinel's, Phalen's, and compression tests were negative for any evidence of ongoing carpal tunnel syndrome. He opined that there was no impairment for appellant's right carpal tunnel syndrome, status postsurgery. Regarding appellant's left carpal tunnel condition, Dr. Didizian indicated that appellant complained of weakness and that the Jamar numbers were consistent with intrinsic

[11] OWCP attempted to obtain a supplemental report from Dr. Feldman, but he was not responsive.

weakness. He referenced Table 15-23, page 449, for "entrapment [-]- compression neuropathy impairment." Dr. Didizian noted grade modifiers of 1 for test findings and 2 for functional history and physical examination for an average of 2. He concluded that appellant had five percent permanent impairment of the left upper extremity according to the A.M.A., *Guides*.

On October 19, 2017 the DMA, Dr. Nathan Hammel, a Board-certified orthopedic surgeon reviewed the record and agreed with Dr. Didizian's impairment rating. He indicated that the most recent clinical examination showed normal neurologic examination of the upper extremities and negative Tinel's and Phalen's testing. Regarding appellant's left upper extremity, the DMA referenced Table 15-23 for median nerve entrapment and noted grade modifiers of 2 for functional history and physical examination and 1 for clinical studies. After applying the net adjustment formula, he calculated that appellant had five percent permanent impairment of the left upper extremity. Regarding appellant's right upper extremity, the DMA indicated that appellant had zero impairment rating. Regarding appellant's cervical radiculopathy, he reported that appellant had no ratable impairment rating as appellant had no complaints or examination findings to support the abnormalities. The DMA noted a date of maximum medical improvement of August 29, 2017.

By decision dated October 24, 2017, OWCP found that appellant was not entitled to an additional schedule award. It found that the special weight of the medical opinion evidence was represented by Dr. Didizian and the DMA, who indicated that appellant had five percent permanent impairment of the left upper extremity, no permanent impairment of the right upper extremity, and no permanent impairment due to his cervical spine.

On November 2, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative. Appellant related his continued complaints of limited range of motion of his neck and intermittent neck pain radiating into his upper extremities. A hearing was held on March 28, 2018. Counsel alleged that Dr. Didizian's report was insufficiently rationalized because he mischaracterized appellant's ongoing radicular symptoms and failed to consider appellant's accepted brachial neuritis.

By decision dated June 5, 2018, an OWCP hearing representative affirmed the October 24, 2017 decision.

## ***LEGAL PRECEDENT***

A claimant seeking compensation under FECA[12] has the burden of proof to establish the essential elements of his or her claim.[13] With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of the scheduled member of function of the body as a result of an employment injury.[14]

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

[12] *Supra* note 2.

[13] *John W. Montoya*, 54 ECAB 306 (2003).

[14] *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

vested the authority to implement FECA program with the Director of OWCP.[15] 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.[16] FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. 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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.[17] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[18]

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).[19] In addressing impairment for the upper extremities 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).[20] The net adjustment formula is (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX).[21] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.[22]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[23] When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the specialist's opinion requires

[15] *See* 20 C.F.R. §§ 1.1 – 1.4.

[16] 5 U.S.C. § 8107(c).

[17] 20 C.F.R. § 10.404; *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.*, Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

[20] A.M.A., *Guides* 383-492; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[21] *Id.* at 411.

[22] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[23] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[24]

## ***ANALYSIS***

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

OWCP properly found a conflict in medical opinion existed regarding appellant's impairment and referred his claim to Dr. Didizian for an impartial medical examination in order to resolve the conflict, pursuant to 5 U.S.C. § 8123(a). Based on Dr. Didizian's August 29, 2017 report, OWCP denied appellant additional schedule award compensation.

The Board finds, however, that Dr. Didizian's August 29, 2017 report is insufficient to resolve the conflict in medical opinion evidence as it was based on an incomplete SOAF. Specifically, in OWCP's November 21, 2016 decision, an OWCP hearing representative remanded appellant's case because the SOAF failed to include the accepted condition of brachial neuritis. However, the SOAF issued to Dr. Didizian on February 1, 2017 incorrectly noted that the accepted conditions included bilateral carpal tunnel syndrome, neck sprain, and cervical radiculopathy, as opposed to brachial neuritis. The Board has held that when a second opinion or impartial medical specialist renders a medical opinion based on an incomplete or inaccurate SOAF, the probative value of the opinion is diminished or negated altogether.[25] In this case, OWCP did not provide Dr. Didizian with an accurate SOAF including all accepted conditions. Therefore, Dr. Didizian's report is not based on an accurate factual framework and cannot represent the weight of the medical evidence sufficient to establish that appellant is not entitled to any additional schedule award.[26]

The Board finds, therefore, that there remains an unresolved conflict in the medical evidence regarding whether appellant has established greater than five percent permanent impairment of each upper extremity, for which he previously received schedule award compensation. As there is an unresolved conflict in the medical evidence regarding whether appellant has additional permanent impairment of his bilateral upper extremities as a result of his accepted conditions, the case must be remanded for OWCP to obtain a supplemental report from Dr. Didizian for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).[27] After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

## ***CONCLUSION***

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

[24] *Raymond A. Fondots,* 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner),* 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[25] *See G.C.,* Docket No. 18-0842 (issued December 20, 2018); *R.B.,* Docket No. 14-1043 (issued December 12, 2014).

[26] *See S.K.*, Docket No. 16-0273 (issued July 14, 2016).

[27] A.M.A., *Guides* 411.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 5, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further development consistent with this decision.

Issued: June 21, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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