

Appellant received prior schedule awards under OWCP File No. xxxxxx996. On March 2, 2010 OWCP issued a schedule award for seven percent permanent impairment of the right upper extremity based on permanent impairment to her right shoulder. On April 21, 2011 it issued a schedule award for eight percent permanent impairment of appellant's left upper extremity. On November 7, 2011 OWCP issued a schedule award for an additional 21 percent permanent impairment for appellant's right upper extremity (for a combined 28 percent permanent impairment of the right upper extremity) based on loss of range of motion of her shoulder. On January 22, 2014 it found that appellant had an additional 26 percent permanent impairment of the left upper extremity due to her C5-6 cervical radiculopathy (for a combined 34 percent permanent impairment of the left upper extremity).

On November 27, 2012 OWCP issued a schedule award for three percent permanent impairment of appellant's left upper extremity and three percent permanent impairment of her right upper extremity, based on her accepted bilateral carpal tunnel syndrome in File No. xxxxxx992.

On January 15, 2016 appellant filed a claim for an additional schedule award (Form CA-7).

On August 18, 2016 OWCP referred appellant for an impartial medical examination with Dr. Robert Elkins, a Board-certified orthopedic surgeon. In a May 2, 2017 letter, OWCP noted that Dr. Elkins had found nine percent permanent impairment of the right upper extremity due to ulnar nerve cubital tunnel syndrome and carpal tunnel, and five percent permanent impairment of the left upper extremity due to carpal tunnel. It asked Dr. Elkins to consider appellant's prior schedule awards and to determine if appellant had a permanent impairment of greater than 37 percent to her left upper extremity and 31 percent of her right upper extremity previously awarded. In a June 3, 2017 response, Dr. Elkins indicated that, after reviewing appellant's prior ratings, she did not have a greater permanent impairment to her upper extremities than 37 percent to the left arm and 31 percent to the right arm. He noted that he agreed with the prior calculations.

By decision dated June 13, 2017, OWCP determined that the medical evidence of record did not support an increase in the permanent impairment already compensated and, therefore, the requirements had not been met for an additional schedule award.

On August 11, 2017 appellant filed an appeal with the Board. By decision dated April 3, 2018 decision,² the Board found OWCP improperly designated Dr. Elkins as an impartial medical examiner as the underlying conflicting medical opinion evidence was between two physicians selected by OWCP, and thus he was properly considered a second opinion physician. The Board further found that Dr. Elkins' report did not provide sufficient medical rationale to clarify whether appellant would be in receipt of duplicative schedule awards if she received schedule awards for the additional nine percent permanent impairment of the right upper extremity due to ulnar nerve cubital tunnel syndrome and carpal tunnel syndrome and five percent permanent impairment of the left upper extremity due to carpal tunnel that he found appropriate. The Board noted that she had previously only received three percent impairment of the upper extremities bilaterally due to

² *Id.*

carpal tunnel syndrome. The Board also ordered that OWCP clarify with Dr. Elkins his use of the word “average” when discussing grade modifiers.

In a letter dated May 17, 2018, OWCP requested additional information from Dr. Elkins regarding whether his impairment rating was duplicative of those already received by appellant and why he used the word “average” when discussing grade modifiers.

On July 6, 2018 Dr. Elkins responded that his impairment ratings were a total rating for each condition and were not in addition to any prior ratings. He further explained that he used the word “average” not in a mathematical sense, but to describe the use of grade modifiers in the net adjustment formula.

By decision dated August 6, 2018, OWCP denied appellant’s claim for an additional schedule award finding that she had not met her burden of proof to establish greater than 37 percent permanent impairment of her left upper extremity and 31 percent permanent impairment of her right upper extremity. OWCP further continued to refer to Dr. Elkins as the “referee physician” and to indicate that his findings were therefore entitled to special weight.

The Board, having duly considered the matter, concludes that the case is not in posture for decision.

The Board has final authority to determine questions of fact and law. The Board’s determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director of OWCP.³ A decision of the Board is final upon the expiration of 30 days following the date of its order and, in the absence of new review by the Director, the subject matter is *res judicata* and not subject to further consideration by the Board.⁴

On prior appeal, the Board found that Dr. Elkins was not an impartial medical examiner and that his reports were not entitled to the special weight of the medical evidence. As such OWCP improperly weighed Dr. Elkin’s reports in its August 6, 2018 decision.⁵ The Board also previously remanded the case for OWCP to further develop the medical evidence regarding appellant’s entitlement to an additional schedule award. The Board finds that Dr. Elkins’ July 6, 2018 supplemental report did not address the specific deficiencies the Board described in its April 3, 2018 decision.⁶ Dr. Elkins failed to provide the requested medical rationale addressing the issue of whether appellant’s additional permanent impairment ratings of nine percent of the right upper

³ *K.B.*, Docket No. 17-0969 (issued March 13, 2018); *see Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84 (1949). *See also Frank W. White*, 42 ECAB 693 (1991) (the Board’s order in a prior appeal imposed an obligation on the Director to take particular actions as directed). *See L.C.*, Docket No. 09-1816 (issued March 17, 2010) (OWCP did not follow the Board’s instructions); *T.S.*, Docket No. 13-2135 (issued April 3, 2014).

⁴ *See K.B.*, *id.*; 20 C.F.R. § 501.6(d); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998). There is no indication that a petition for reconsideration was filed within 30 days of the issuance of the Board’s April 3, 2018 decision and the decision became final after 30 days had elapsed. 20 C.F.R. § 501.6(d).

⁵ *R.S.*, Docket No. 17-0344 (issued February 15, 2019); *K.B.*, *id.*

⁶ *T.D.*, Docket No. 16-1883 (issued December 27, 2017).

extremity due to ulnar nerve cubital tunnel syndrome and carpal tunnel, and five percent permanent impairment of the left upper extremity due to carpal tunnel were or were not duplicative of the bilateral upper extremity schedule awards that she had previously received.⁷

The Board will therefore set aside OWCP's August 6, 2018 decision and remand the case for further development of appellant's claim for an additional schedule award, including resolution of the issues that the Board first raised in its April 3, 2018 decision.⁸ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's bilateral upper extremity impairment for schedule award purposes. Accordingly,

IT IS HEREBY ORDERED THAT the August 6, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this order of the Board.

Issued: September 18, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

⁷ *L.C.*, Docket No. 18-0519 (issued March 8, 2019); *J.K.*, Docket No. 16-1361 (issued April 19, 2017).

⁸ *J.H.*, Docket No. 15-0546 (issued May 20, 2015).