

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

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<b>B.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1441</b>
	)	<b>Issued: July 30, 2021</b>
<b>DEPARTMENT OF THE ARMY, PROVOST</b>	)	
<b>MARSHAL OFFICE, Fort Stewart, GA,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 27, 2020 appellant filed a timely appeal from a February 27, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish greater than five percent permanent impairment of her right arm and two percent permanent impairment of the

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the February 27, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

left arm for which she previously received schedule award compensation; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,221.97, for which she was not at fault, for the period December 9, 2013 through May 10, 2014, because she received schedule award compensation for the right and left arms to which she was not entitled; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On August 14, 1995 appellant, then a 33-year-old office automation clerk, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome in her hands and wrists due to factors of her federal employment, including typing. OWCP accepted the claim for bilateral carpal tunnel syndrome<sup>3</sup> and paid her wage-loss compensation on the daily rolls, effective February 6, 2002.

Appellant retired on disability effective March 2003.

In a March 19, 2014 report, Dr. Stephen Pappas, a Board-certified neurologist, noted that the repetitive nature of appellant's job caused bilateral wrist/hand pain and paresthesia. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>4</sup> he found that she had five percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity due to carpal tunnel syndrome. Dr. Pappas indicated that appellant had a six percent whole person impairment.

On September 29, 2014 OWCP referred appellant for a schedule award impairment rating with its district medical adviser (DMA). In a September 29, 2014 report, the DMA reviewed the medical evidence of record. He opined that appellant had reached maximum medical improvement (MMI) on December 9, 2013. The DMA noted her carpal tunnel release procedures and indicated that she still experienced pain, numbness, and tingling in her hands, fingers, and wrists. Utilizing the sixth edition of the A.M.A., *Guides*,<sup>5</sup> Table 15-23, page 449, he agreed with Dr. Pappas that appellant had two percent permanent impairment of the left upper extremity and five percent permanent impairment of the right upper extremity.

On October 27, 2014 OWCP granted appellant a schedule award for five percent permanent impairment of the right arm and two percent permanent impairment of the left arm. The award ran for 21.84 weeks during the period December 9, 2013 through May 10, 2014.

On October 18, 2018 appellant filed a claim for an additional schedule award (Form CA-7).

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<sup>3</sup> Appellant underwent OWCP-authorized right endoscopic carpal tunnel release on February 6, 2002, right open carpal tunnel release and external neurolysis on April 10, 2002, left carpal tunnel release and external neurolysis on June 2, 2003, right carpal tunnel release and right guyon canal release on June 2, 2011, left carpal tunnel release and left long finger A1 pulley release on February 18, 2015, and right ring finger A1 pulley release on February 3, 2016.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> *Id.*

In a development letter dated October 29, 2018, OWCP informed appellant that the medical evidence of record was insufficient to establish her claim for an additional schedule award.<sup>6</sup> It requested that she submit a detailed narrative medical report from her treating physician based upon a recent examination including a date of MMI, the diagnosis upon which the impairment rating was based, a detailed description of any preexisting impairment, and a final rating of the permanent impairment and discussion of the rationale for calculation of the impairment, with references to the applicable criteria and tables of the sixth edition of the A.M.A., *Guides*.<sup>7</sup> OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received an April 9, 2018 report from Dr. Mark A. Winchell, a Board-certified orthopedic surgeon, who noted that appellant was experiencing persistent wrist pain. On examination, he found that she showed good grip strength bilaterally. He indicated that appellant had no residual evidence of tennis elbow, carpal tunnel syndrome, or other common extremity abnormalities. Dr. Winchell opined that she had reached MMI and diagnosed left forearm pain, right wrist pain, and right elbow pain.

On February 12, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), and a series of questions for a second opinion examination with Dr. H. Clark Deriso, a Board-certified orthopedic surgeon. In a March 15, 2019 report, Dr. Deriso reviewed the SOAF and medical record. He noted that appellant had night pain, numbness, tingling, and complaints of weakness in both hands. Dr. Deriso examined her and indicated that she had a mildly positive Tinel's sign on the right and left and a Phalen's test that affected all of her fingers. He diagnosed bilateral carpal tunnel pain, history of left long trigger finger, and history of right ring trigger finger. Dr. Deriso opined that appellant's conditions had resolved and that she reached MMI on March 15, 2019. Utilizing the A.M.A., *Guides*,<sup>8</sup> he found that she had one percent permanent impairment of the right wrist and one percent permanent impairment of the left wrist. Dr. Deriso assigned a grade modifier of one, in accordance with Table 15-23, page 449, as appellant's electromyography showed mild residuals. He noted that her range of motion (ROM) was within normal limits and that she had no impairment of the left long finger and right ring finger.

On April 2, 2019 OWCP requested clarification from Dr. Deriso regarding whether appellant's impairment rating of one percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity included the five percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity previously awarded, or whether it should be considered an addition to the prior percentage awarded.

In an April 9, 2019 supplemental report, Dr. Deriso noted that appellant's prior impairment rating was not performed by a physician and opined that his rating of one percent right wrist impairment and one percent left wrist impairment was appropriate.

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<sup>6</sup> The development letter noted that appellant's accepted conditions included bilateral trigger finger acquired.

<sup>7</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>8</sup> *Id.*

On April 15, 2019 OWCP referred appellant's medical record, along with a SOAF, for a schedule award impairment rating with Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a DMA. In a May 19, 2019 report, the DMA reviewed the SOAF and medical record. Utilizing the ROM method of the A.M.A., *Guides*,<sup>9</sup> he found that appellant had zero percent permanent impairment of the upper extremity for right carpal tunnel syndrome, left carpal tunnel syndrome, triggering of the right ring finger, and triggering of the left middle finger. Utilizing Table 15-23 (Entrapment/Compression Neuropathy Impairment), page 449, the DMA determined that her right and left carpal tunnel syndrome should be rated using the diagnosis-based impairment (DBI) method under Table 15-2, page 389. He identified the class of diagnosis (CDX) as a class 1 impairment for the diagnosis of nonspecific wrist pain. The DMA assigned a grade modifier for functional history (GMFH) of 0, in accordance with Table 15-7, page 406, as appellant had no documented wrist pain. He reported a grade modifier for physical examination (GMPE) of 0, in accordance with Table 15-8, page 408, as there were no palpatory findings. The DMA noted that a grade modifier for clinical studies (GMCS) was not applicable, in accordance with Table 15-9, page 410, as there were no relevant imaging studies. He calculated that appellant had a net adjustment of -2, resulting in movement from the default class of C to A and corresponding to a zero percent upper extremity impairment. The DMA also found that her right ring trigger finger and left middle trigger finger should be rated utilizing the method. He identified the CDX as a class 0 impairment for the diagnosis of trigger digit with no residual symptoms under Table 15-2, page 392. The DMA noted that appellant had previously received schedule award compensation for five percent impairment for the right upper extremity and two percent impairment for the left upper extremity; however, he found that she had zero percent upper extremity permanent impairment and that, therefore, additional impairment was not indicated. He disagreed with Dr. Deriso's impairment rating as there were no preoperative diagnostic studies. The DMA opined that appellant reached MMI on March 19, 2014.

By decision dated June 5, 2019, OWCP denied appellant's claim for an additional schedule award, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It noted that the weight of the medical evidence rested with Dr. Slutsky, the DMA.

On June 10, 2019 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In an August 1, 2019 report, Dr. Winchell noted that appellant experienced bilateral hand and wrist pain. He examined her and diagnosed lateral epicondylitis of the right elbow, right forearm pain, and bilateral hand pain.

A telephonic hearing was held on November 15, 2019. During the hearing, appellant explained that she had continued bilateral hand and wrist pain despite extensive medical treatment. The hearing representative held the case record open for 30 days for the submission of additional evidence. No additional evidence was received.

By decision dated December 26, 2019, OWCP's hearing representative affirmed the June 5, 2019 decision, finding that the medical evidence of record was insufficient to establish

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<sup>9</sup> *Id.*

permanent impairment of either upper extremity. The hearing representative noted that, upon return of the case record, OWCP should consider whether an overpayment existed with respect to the prior award for five percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity.

On January 22, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$13,221.97 had been created, for the period December 9, 2013 through May 10, 2014, because appellant had previously received a schedule award for five percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity when she had no upper extremity impairment. It found her not at fault in the creation of the overpayment and forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). OWCP requested that appellant provide supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support her reported income and expenses. It afforded her 30 days to respond. No response was received.

By decision dated February 27, 2020, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$13,221.97, for the period December 9, 2013 through May 10, 2014, because she received schedule award compensation for the right and left upper extremities to which she was not entitled. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record was insufficient to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. OWCP requested that appellant forward recovery of the \$13,221.97 overpayment in full within 30 days.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA,<sup>10</sup> and its implementing federal regulations,<sup>11</sup> 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>12</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>13</sup>

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.<sup>14</sup> In

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<sup>10</sup> 5 U.S.C. § 8107.

<sup>11</sup> 20 C.F.R. § 10.404.

<sup>12</sup> *Id.* at § 10.404(a).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>14</sup> A.M.A., *Guides* 449.

Table 15-23, grade modifier levels (ranging from 0 to 4) are described for the categories Test Findings, History, and Physical Findings. The grade modifier levels are averaged to arrive at 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.<sup>15</sup>

The sixth edition of the A.M.A., *Guides* provides a method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health.<sup>16</sup> Under the sixth edition, the evaluator identifies the CDX, which is then adjusted by the GMFH, GMPE, and GMCS.<sup>17</sup> The net adjustment formula is  $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$ .<sup>18</sup> Evaluators are directed to provide reasons for their impairment rating, including the choice of diagnoses from regional grids and the calculation of the modifier score.<sup>19</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>20</sup>

### **ANALYSIS -- ISSUE 1**

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

On April 15, 2019 OWCP referred appellant's case, along with a SOAF, for a schedule award impairment rating with Dr. Slutsky, the DMA. In a May 19, 2019 report, the DMA reviewed the SOAF and medical record. Utilizing the method of the A.M.A., *Guides*, he identified the CDX as a class 1 impairment for the diagnosis of nonspecific wrist pain. The DMA assigned a GMFH of 0, in accordance with Table 15-7, page 406, as appellant had no documented wrist pain. He reported a GMPE of 0, in accordance with Table 15-8, page 408, as there were no palpatory findings. The DMA noted that a GMCS was not applicable, in accordance with Table 15-9, page 410, as there were no relevant imaging studies. He calculated that appellant had a net adjustment of -2, resulting in movement from the default class of C to A and corresponding to a zero percent permanent impairment of the right upper extremity. The DMA also found that her right ring trigger finger and left middle trigger finger should be rated utilizing the method. He identified the CDX as a class 0 impairment for the diagnosis of trigger digit with no residual

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<sup>15</sup> A survey completed by a given claimant, known by the name *QuickDASH*, may be used to determine the functional scale score. *Id.* at 448-49; *see also J.H.*, Docket No. 19-0395 (issued August 10, 2020).

<sup>16</sup> A.M.A., *Guides*, page 3, section 1.3, The International Classification of Functioning, Disability, and Health (ICF): A Contemporary Model of Disablement.

<sup>17</sup> *Id.* at 493-556.

<sup>18</sup> *Id.* at 521.

<sup>19</sup> *E.W.*, Docket No. 19-1720 (issued November 25, 2020); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>20</sup> *See supra* note 13 at Chapter 2.808.6(f) (March 2017).

symptoms under Table 15-2, page 392. The DMA therefore found that appellant had zero percent permanent impairment. He opined that she reached MMI on March 19, 2014.

The Board finds that the DMA did not adequately explain his opinion in accordance with the relevant standards. Although he identified the CDX as a class 1 impairment for the diagnosis of nonspecific wrist pain and a class 0 impairment for the diagnosis of trigger digit with no residual symptoms, the DMA did not sufficiently explain how he classified appellant's conditions based on severity.<sup>21</sup> Further, as noted, GMFH, GMPE, and GMCS should be considered.<sup>22</sup> While the DMA cited to Table 15-7, Table 15-8, and Table 15-9, he did not adequately explain the application of grade modifiers.<sup>23</sup> He applied a GMFH of 0 as appellant had no documented wrist pain. However, in an April 9, 2018 report, Dr. Winchell noted that appellant had persistent wrist pain and diagnosed left forearm pain, right wrist pain, and right elbow pain. In a March 15, 2019 report, Dr. Deriso diagnosed bilateral carpal tunnel pain. Furthermore, the DMA reported a GMPE of 0 as appellant had no palpatory findings. However, in a March 15, 2019 report, Dr. Deriso noted that she had night pain, numbness, tingling, and complaints of weakness in both hands. He examined appellant and indicated that she had a mildly positive Tinel's sign on the right and left and a Phalen's test that affected all of her fingers. Consequently, the Board finds that the DMA's report requires clarification.

It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>24</sup> Once OWCP undertook development of the evidence by referring appellant's case file to an OWCP medical adviser, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.<sup>25</sup> The case is therefore remanded to OWCP for referral of the case record and a SOAF to the DMA, Dr. Slutsky, for a proper analysis under the A.M.A., *Guides* in order to determine the extent of appellant's permanent impairment of the right and left upper extremities. After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>26</sup> Section 8129(a) of FECA provides, in pertinent part, that when

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<sup>21</sup> See *D.O.*, Docket No. 19-1729 (issued November 3, 2020); *R.O.*, Docket No. 10-2143 (issued August 15, 2011).

<sup>22</sup> *Supra* note 17.

<sup>23</sup> See *D.O.*, *supra* note 21.

<sup>24</sup> See *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>25</sup> See *G.M.*, Docket No. 19-1931 (issued May 28, 2020); *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

<sup>26</sup> 5 U.S.C. § 8102(a).

an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>27</sup>

OWCP's procedures provide that if a schedule award decision is set aside (after a hearing or review by the Board or as part of OWCP's reconsideration process), and additional development is undertaken to resolve the schedule award issue, a new schedule award decision should be issued that fully addresses the reasons for the change in rating. Declaring an overpayment thereafter is appropriate if the later decision substantiates a lesser degree of permanent impairment than previously awarded, so long as both ratings are based on the same edition of the A.M.A., *Guides*.<sup>28</sup>

### **ANALYSIS -- ISSUE 2**

In light of the Board's finding in Issue 1, the Board finds that OWCP improperly determined that an overpayment of compensation in the amount of \$13,221.97 was created for the period December 9, 2013 through May 10, 2014. Therefore, the February 27, 2020 decision must be reversed.<sup>29</sup>

### **CONCLUSION**

The Board finds that OWCP improperly determined that an overpayment of compensation in the amount of \$13,221.97 was created for the period December 9, 2013 through May 10, 2014.

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<sup>27</sup> *Id.* at § 8129(a).

<sup>28</sup> *See supra* note 13 at Chapter 2.1601.8 (September 2020); *see also* *L.L.*, Docket No. 19-0097 (issued March 20, 2020).

<sup>29</sup> *See P.M.*, Docket No. 18-1215 (issued June 18, 2020). In light of the Board's disposition in Issues 1 and 2, Issue 3 is rendered moot.



**ORDER**

**IT IS HEREBY ORDERED THAT** the February 27, 2020 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 30, 2021  
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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