United States Department of Labor
Employees' Compensation Appeals Board

L.Y., Appellant **and** **U.S. POSTAL SERVICE, CAPITAL METRO AREA OFFICE, Gaithersburg, MD, Employer**	)	**Docket No. 22-0837** **Issued: November 23, 2022**

Appearances:
Appellant, pro se
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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On May 2, 2022 appellant filed a timely appeal from a February 7, 2022 merit decision and an April 4, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

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[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the April 4, 2022 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*.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish greater than 14 percent permanent impairment of her left upper extremity and 3 percent permanent impairment of her right upper extremity, for which she has previously received schedule award compensation; and (2) whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

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

On October 27, 2010 appellant, then a 58-year-old retired human resources manager, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome while performing repetitive duties which were required by factors of her federal employment.[4] OWCP accepted her claim for bilateral carpal tunnel syndrome, left sprain of the shoulder, rotator cuff, and upper arm; and other affections of the left shoulder region not elsewhere classified. Appellant underwent a left carpal tunnel release on February 21, 2011 and a right carpal tunnel release on June 27, 2011. OWCP subsequently expanded the acceptance of the claim to include an acquired trigger finger on the right. On October 11, 2012 appellant underwent an arthroscopic left rotator cuff tendon repair with debridement and subacromial decompression. On February 26, 2013 she underwent a right index trigger finger release. Appellant returned to work following each surgery.

By decision dated December 29, 2011, OWCP granted appellant a schedule award for three percent permanent impairment of each upper extremity due to carpal tunnel syndrome.

On August 7, 2013 appellant filed a claim for an additional schedule award (Form CA-7).

By decision dated February 25, 2014, OWCP granted appellant a schedule award for an additional four percent permanent impairment of the left upper extremity due to a full-thickness tear of the rotator cuff, for a total award of seven percent left upper extremity permanent impairment.

On February 2, 2015 appellant requested reconsideration. She argued that she was entitled to an increased left upper extremity schedule award as the seven percent permanent impairment rating only incorporated her left shoulder conditions but did not include her carpal tunnel

[3] Docket No. 20-0398 (issued February 9, 2021); Docket No. 15-1344 (issued March 10, 2016).

[4] Appellant retired from the employing establishment on July 30, 2010.

condition. Additional reports from Dr. Stephen D. Webber, a Board-certified orthopedic surgeon were submitted.[5]

By decision dated March 10, 2015, OWCP denied appellant's request for reconsideration.

On June 1, 2015 appellant appealed to the Board. By decision dated March 10, 2016, the Board set aside OWCP's March 10, 2015 decision, finding that appellant's request for reconsideration was sufficient to require a merit review. The Board remanded the case for a *de novo* decision on appellant's claim for an additional schedule award.[6]

Following further development, by decision dated November 17, 2016, OWCP found that appellant had an additional 3 percent permanent impairment of the left upper extremity, for a total of 10 percent permanent impairment of the left upper extremity. The award represented seven percent permanent impairment of the left shoulder and three percent permanent impairment of the left wrist.

Following further development, by decision dated January 18, 2018, OWCP granted appellant a schedule award for an additional 3 percent permanent impairment of the left upper extremity, for a total 13 percent left upper extremity impairment. No additional impairment was awarded for the right upper extremity greater than the three percent impairment previously awarded.

On January 22, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 6, 2018, the hearing representative vacated OWCP's January 18, 2018 decision. He remanded the case to OWCP for further review by the district medical advisor (DMA), Dr. Morley Slutsky, a Board-certified occupational medicine physician, followed by a *de novo* decision.

Following further development, OWCP determined that there was a conflict of medical opinion evidence between appellant's treating physician, Dr. Robert W. Macht, a general surgeon, and the DMA, Dr. Slutsky, regarding the extent of appellant's upper extremity permanent impairment. On November 5, 2018 it referred appellant, along with a November 1, 2018 statement of accepted facts (SOAF), to Dr. Sankara R. Kothakota, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated December 6, 2018, Dr. Kothakota related that appellant's left shoulder rotator cuff condition could be related to the accepted injury, but that appellant had not sustained any other left shoulder condition from the accepted injury. He opined that he concurred with Dr. Slutsky's permanent impairment rating.

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[5] In an October 1, 2014 report, Dr. Webber confirmed that his seven percent rating for the shoulder did not take into account any other impairment of the left upper extremity.

[6] *See supra* note 3.

By *de novo* decision dated March 25, 2019, OWCP denied appellant's claim for an increased schedule award. It accorded the special weight of the medical evidence to Dr. Kothakota's impartial medical opinion.

In a revised *de novo* decision dated April 9, 2019, OWCP notified appellant that the claim for an increased schedule award for the right upper extremity in excess of the three percent impairment previously awarded remained denied. However, an additional one percent impairment to the left upper extremity was awarded, for a total of 14 percent permanent impairment to the left upper extremity. The claims examiner noted that appellant never received the additional one percent left upper extremity impairment which the DMA found that she was entitled to in his September 30, 2018 report and with which Dr. Kothakota agreed.

By separate decision dated April 9, 2019, OWCP formally awarded appellant an additional one percent schedule award for permanent impairment of the left upper extremity, for a total of 14 percent left upper extremity permanent impairment. The period of the award, equivalent to 3.12 weeks of compensation, ran for the period July 19 to August 9, 2017.

On April 24, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on August 21, 2019. OWCP subsequently received a July 27, 2019 statement from appellant.

By decision dated November 5, 2019, OWCP's hearing representative affirmed the April 9, 2019 decisions. On December 11, 2019 appellant appealed the November 5, 2019 decision to the Board.

By decision dated February 19, 2020, OWCP denied expansion of the claim to include arthritis as a consequential injury.

By decision February 9, 2021, the Board set aside OWCP's November 5, 2019 decision and remanded the case for a *de novo* review.[7] The Board found that a conflict in medical opinion existed between Dr. Macht and the DMA, Dr. Slutsky, but that Dr. Kothakota, the IME, did not resolve the conflict in medical opinion with regards to impairment of appellant's left and right upper extremities as he had not provided specific permanent impairment ratings of appellant's upper extremity permanent impairment. The Board found that OWCP should have either referred the case back Dr. Kothakota or to a new impartial medical specialist for clarification.

In a March 25, 2021 letter, OWCP requested that Dr. Kothakota clarify his opinion with regard to the impairment rating of appellant's bilateral upper extremities. It advised him to provide specifics as to her clinical and physical findings in support of her impairment ratings for right trigger finger. Dr. Kothakota was also asked to provide a description of the specific evaluations he performed and how he arrived at her upper extremity impairment ratings, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[8] OWCP noted that, if Dr. Kothakota felt an additional impairment evaluation

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[7] *See supra* note 3.

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

of appellant was necessary, then he should contact OWCP. Dr. Kothakota was afforded 30 days to provide the requested information. He did not respond to OWCP's request for clarification.

On November 1, 2021 OWCP referred appellant to Dr. Rafael A. Lopez, a Board-certified orthopedic surgeon, for a second opinion permanent impairment examination.

In a December 18, 2021 report, Dr. Lopez noted that he had reviewed the SOAF and appellant's medical records. He related her physical examination findings. Dr. Lopez opined that appellant had 7 percent left upper extremity permanent impairment based on the diagnosis-based impairment (DBI) methodology; 6 percent left upper extremity impairment based on the range of motion (ROM) methodology, and 2 percent right upper extremity permanent impairment. He completed a permanent impairment worksheet for both the left and right upper extremities and provided supplemental range of motion examination findings for the left shoulder. Regarding the left upper extremity, Dr. Lopez found that appellant had five percent permanent impairment for full-thickness tear of the rotator cuff, and two percent permanent impairment due to median nerve entrapment. Regarding the right upper extremity, he found that appellant had zero percent permanent impairment due to her trigger finger condition, and two percent permanent impairment due to median nerve entrapment.

In a January 29, 2022 report, the DMA, Dr. Slutsky, reviewed the SOAF, the medical record, and Dr. Lopez' report. He found that appellant reached maximum medical improvement on December 22, 2021. The DMA opined that appellant had a permanent impairment rating of six percent left upper extremity impairment utilizing DBI impairment methodology for a left rotator cuff tear and eight percent left upper extremity impairment under ROM impairment methodology for left rotator cuff tear. He found that appellant had zero percent upper extremity impairment for right carpal tunnel syndrome, triggering of right index finger, and left carpal tunnel syndrome. The DMA noted several deficiencies with Dr. Lopez' report. With regards to the diagnosis of bilateral carpal tunnel syndrome, the DMA noted that Dr. Lopez did not state whether appellant had any symptoms. He noted under physical examination that there was a negative Tinel's sign and a negative Phalen's test. However, Dr. Lopez did not test the strength of the abductor pollicis brevis nor perform a sensory examination. In the worksheet, Dr. Lopez assigned a grade modifier for functional history (GMFH) of 1, a grade modifier for physical findings (GMPE) of 1, and a grade modifier for clinical studies (GMCS) of 1, resulting in zero percent bilateral upper extremity impairment. With regard to the trigger finger, the DMA noted that Dr. Lopez did not specify which finger was involved, nor did he make mention of a trigger finger. On the worksheet Dr. Lopez assigned appellant five percent DBI, but did not specify any symptoms. He also assigned a GMFH of 1, a GMPE of 1, and a GMCS of 1, but did not provide any rationale. The DMA noted that under Table 15-9, a rotator cuff tear was consistent with a grade modifier of 2.

By decision dated February 7, 2022, OWCP denied the claim for an increased schedule award as appellant's current permanent impairment was less than the prior percentages of permanent impairment previously awarded. It accorded the weight of the medical evidence to the January 29, 2022 report of the DMA, Dr. Slutsky.

On March 14, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated April 4, 2022, OWCP denied appellant's request for an oral hearing as untimely filed as it was not made within 30 days of OWCP's February 7, 2022 decision. As the request was untimely filed, it concluded that she was not entitled to a hearing as a matter of right. OWCP exercised its discretion and denied a hearing, noting that appellant could instead file for reconsideration before OWCP's district office and submit evidence in support of her impairment not previously considered.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,[9] and its implementing federal regulations,[10] 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.[11] 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.[12]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.[13] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).[14] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[15] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[16]

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[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

[13] A.M.A., *Guides* (6th ed. 2009) 3, section 1.3.

[14] *Id.* at 383-492.

[15] *Id.* at 411.

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

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides, in part:

> "As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (via the updated instructions noted above) to the rating physician(s).
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> "Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the [A.M.A.,] Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used*." (Emphasis in the original.)[17]

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.[18] For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.[19] In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[20]

ANALYSIS -- ISSUE 1

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

In its February 9, 2021 decision, the Board found that a conflict in medical opinion existed between Dr. Macht and the DMA, Dr. Slutsky, with regard to permanent impairment of appellant's bilateral upper extremities.[21] It further found that Dr. Kothakota, the IME, did not resolve the conflict in medical opinion with regards to impairment of appellant's left and right upper extremities and that OWCP should have either referred the case back Dr. Kothakota or to a new IME for clarification. On remand Dr. Kothakota did not respond to OWCP's request to clarify his opinion. OWCP should have therefore referred appellant to a new IME as the conflict in

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[17] FECA Bulletin No. 17-06 (issued May 8, 2017); *see also W.H.,* Docket No. 19-0102 (issued June 21, 2019).

[18] 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[19] *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

[20] *See R.K.,* Docket No. 21-0387 (issued May 20, 2022); *D.M.,* Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts,* 31 ECAB 1010 (1980).

[21] *See supra* note 3.

medical opinion remained between Dr. Macht and the DMA, regarding permanent impairment of appellant's bilateral upper extremities.[22] OWCP, however, referred appellant to Dr. Lopez for a second opinion examination. The DMA, Dr. Slutsky, who was part of the original conflict of medical opinion, then reviewed Dr. Lopez' report, and found that it contained numerous deficiencies. He then calculated an impairment rating less than the percentage of permanent impairment previously awarded.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[23] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[24]

As previously discussed in the Board's February 9, 2021 decision, there is an unresolved conflict in the medical opinion evidence between appellant's attending physician Dr. Macht and the DMA, Dr. Slutsky with regard to appellant's permanent impairment of her bilateral upper extremities.

Because there remains an unresolved conflict in medical opinion evidence regarding appellant's permanent impairment of her bilateral upper extremities, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the case record and a SOAF, to a specialist in the appropriate field of medicine for an impartial medical examination to resolve the conflict. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.[25]

CONCLUSION

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

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[22] *See S.M.,* Docket No. 20-1527 (issued March 29, 2022); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis*, 30 ECAB 1071 (1979).

[23] *L.F.*, Docket No. 20-0459 (issued January 27, 2021); *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

[24] *Id.*; *see also R.M.*, Docket No. 16-0147 (issued June 17, 2016).

[25] In light of the Board's disposition of issue 1, issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the February 7 and April 4, 2022 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: November 23, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board