

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

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<b>T.F., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-1418</b>
	)	<b>Issued: March 6, 2023</b>
<b>DEPARTMENT OF THE NAVY, BUREAU OF</b>	)	
<b>MEDICINE AND SURGERY STATIONS,</b>	)	
<b>Patuxent, MD, Employer</b>	)	
_____	)	

*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. McGINLEY, Alternate Judge

**JURISDICTION**

On September 27, 2021 appellant, through counsel, filed a timely appeal from an August 25, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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 an 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the August 25, 2021 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.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish greater than six percent permanent impairment of the left upper extremity and zero percent permanent impairment of her left lower extremity, for which she has received a schedule award.

## FACTUAL HISTORY

This case has previously been before the Board on a different issue.<sup>4</sup> The relevant facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 12, 2015 appellant, then a 49-year-old financial technician, filed a traumatic injury claim (Form CA-1) alleging that on March 6, 2015 she twisted her back, shoulder, and knee when trying to grab a door to prevent herself from falling on ice while in the performance of duty. OWCP accepted the claim for left shoulder and upper arm sprain, left knee and leg sprain, and lumbar sprain. It paid appellant compensation on the supplemental rolls from April 21, 2015 to April 20, 2016.

In a memorandum of telephone call (Form CA-110) dated May 20, 2016, appellant requested that the acceptance of her claim be expanded to include the additional conditions of left hip strain and sciatica.

By decision dated August 4, 2016, OWCP denied appellant's request to expand the acceptance of her claim to include the additional conditions of hip strain and sciatica. On October 3, 2016 appellant requested reconsideration. By decision dated December 15, 2016, OWCP denied modification of the August 4, 2016 decision.

On February 1, 2017 appellant, through counsel, filed a timely appeal from the December 15, 2016 merit decision. By decision dated August 15, 2018, the Board affirmed the December 15, 2016 decision. The Board found that appellant had not established that her left hip strain and sciatica were causally related to her March 6, 2015 employment injury.<sup>5</sup>

On October 13, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On December 14, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Rafael A. Lopez Steuart, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the cause and extent of her employment-related permanent impairment. It requested that he provide an opinion in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>6</sup>

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<sup>4</sup> Docket No. 17-0645 (issued August 15, 2018).

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

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

In a December 27, 2018 report, Dr. Joshua B. Macht, appellant's treating physician, a Board-certified internist, noted appellant's history of injury and medical treatment. He provided her physical examination findings and utilized the A.M.A., *Guides* to find that she had 6 percent permanent impairment of the left upper extremity as a result of her left shoulder condition, 5 percent permanent impairment of the left lower extremity as a result of her left hip condition, and 11 percent permanent impairment of the left lower extremity as a result of her left knee condition. Dr. Macht combined the left lower extremity ratings and opined that appellant had 15 percent permanent impairment of the left lower extremity as a result of her left hip and knee conditions.

In a report dated January 23, 2019, Dr. Steuart noted appellant's history of injury and medical treatment. He also related her physical examination findings. Dr. Steuart utilized the A.M.A., *Guides* and determined that appellant had zero percent permanent impairment of her left knee. Regarding the left shoulder, he determined that she had 1 percent permanent impairment utilizing the diagnosis-based impairment (DBI) method and 12 percent impairment utilizing the range of motion (ROM) method. In a February 7, 2019 addendum, Dr. Steuart noted that appellant did not have any sensory or motor deficit from the lumbar sprain and opined that she had no permanent impairment as a result of the accepted lumbar sprain.

On March 15, 2019 OWCP requested that Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), review the medical record and provide an opinion as to whether appellant sustained permanent impairment which would entitle her to a schedule award.

In a March 22, 2019 report, the DMA determined that, a conflict in medical opinion existed between Dr. Macht, appellant's treating physician, and Dr. Steuart, an OWCP second opinion physician, with regard to the extent of her permanent impairment of her left upper and left lower extremities due to the March 6, 2015 employment injury. He also noted that both Dr. Macht and Dr. Steuart agreed that she did not have a spinal nerve impairment based on the accepted lumbar spine condition.

On April 9, 2019 OWCP referred appellant, a SOAF, the medical record, and a list of questions, to Dr. Mohammad Zamani, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical opinion evidence between Dr. Macht and Dr. Steuart.

In a report dated April 30, 2019, Dr. Zamani noted appellant's history of injury and physical examination findings. He utilized the fourth edition of the A.M.A., *Guides*<sup>7</sup> and determined that she had full ROM of the left leg and therefore zero percent permanent impairment of the left lower extremity. Dr. Zamani also found that appellant had 10 percent permanent impairment of the left upper extremity due to loss of ROM of the left shoulder.

By decision dated July 15, 2019, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left lower extremity (leg) and 0 percent permanent impairment of the left upper extremity (arm). The period of the award was for 28.8 weeks running from April 30 to November 17, 2019.

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<sup>7</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

On July 22, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on November 4, 2019.

In a January 16, 2020 decision, OWCP's hearing representative set aside the July 15, 2019 OWCP decision. The hearing representative noted that the basis for the July 15, 2019 decision was unclear because it awarded appellant 10 percent permanent impairment for the left lower extremity and 0 percent for the left upper extremity, while Dr. Zamani found no permanent impairment of the left lower extremity and 10 percent permanent impairment of the left upper extremity. OWCP's hearing representative further noted that Dr. Zamani used the fourth edition, rather than the sixth edition of the A.M.A., *Guides*. The hearing representative also noted that Dr. Zamani apportioned the 10 percent impairment rating as 4 percent attributable to the work injury while the A.M.A., *Guides* did not allow for apportionment. OWCP's hearing representative directed that, upon return of the case record, OWCP should seek clarification from Dr. Zamani under the sixth edition of the A.M.A., *Guides*, for both the left upper and lower extremities and that his report should be reviewed by the DMA to assure the correct application of the A.M.A., *Guides*.

On July 10 and August 19, and 28, 2020 OWCP referred appellant, a SOAF, the medical record, and a list of questions, to Dr. Robert M. Saltzman, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict between Dr. Macht and Dr. Steuart.

In a September 3, 2020 report, Dr. Saltzman reviewed the SOAF and the medical record, and discussed his examination findings regarding appellant's upper and lower extremities. He opined that she sustained zero percent permanent impairment of the left lower extremity and six percent permanent impairment of the left upper extremity. Dr. Saltzman related that he was in agreement with Dr. Macht that appellant had six percent permanent impairment of the left upper extremity, due to loss of ROM of the left shoulder, as a result of the March 6, 2015 employment injury. He also found that she had reached maximum medical improvement on October 23, 2018.

By decision, dated November 6, 2020, OWCP determined that appellant was not entitled to an additional schedule award for permanent impairment of either the left upper or lower extremity.

On November 12, 2020 counsel for appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 2, 2021.

By decision dated March 10, 2021, an OWCP hearing representative set aside the July 15, 2019 decision. The hearing representative explained that OWCP provided appellant a schedule award for 10 percent permanent impairment of the left lower extremity, and 0 percent permanent impairment of the left upper extremity, rather than 6 percent permanent impairment of the left upper extremity and 0 percent impairment of the left lower extremity as indicated by Dr. Saltzman. He also explained that, as appellant had been provided a schedule award for 201.60 days of compensation for the left lower extremity, which should have applied to the left upper extremity, there was no entitlement to additional compensation since she was only entitled to 131.04 days of compensation for the left upper extremity. OWCP's hearing representative indicated that, upon return of the case file, OWCP "should issue a proper (corrected) Formal Decision with regard to the left lower extremity and left upper extremity" as the July 15, 2019 decision was erroneous.

By decision dated March 24, 2021, OWCP granted appellant a schedule award for six percent permanent impairment of the left upper extremity, and zero percent permanent impairment of the left lower extremity, to run for 18.72 weeks from April 30 to September 8, 2019.

On March 30, 2021 counsel for appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 7, 2021.

Counsel submitted a new report from Dr. Macht dated April 19, 2021 and argued that appellant had nine percent permanent impairment of her left upper extremity, rather than the six percent previously awarded. He further indicated that he would submit an additional report from Dr. Macht regarding her left lower extremity permanent impairment.

In his report dated April 19, 2021, Dr. Macht related that Dr. Saltzman's own physical examination findings of appellant's left shoulder reflected that she had nine percent permanent impairment of the left upper extremity due to loss of ROM. He noted that, since Dr. Saltzman's examination was the most up-to-date examination, Dr. Saltzman's finding should have been used to determine her permanent impairment.

By decision dated August 25, 2021, an OWCP hearing representative affirmed the March 24, 2021 decision. The hearing representative accorded the special weight of the evidence to Dr. Saltzman, and explained that Dr. Macht's April 19, 2021 report was of limited probative value as Dr. Macht was on one side of the conflict.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>8</sup> and its implementing federal regulations,<sup>9</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. 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.<sup>10</sup> 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.<sup>11</sup>

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*

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<sup>8</sup> *Supra* note 2.

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

<sup>11</sup> *See L.Y.*, Docket No. 20-0398 (issued February 9, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

(ICF).<sup>12</sup> 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).<sup>13</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>14</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>15</sup>

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).

“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.”<sup>16</sup>

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>17</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner (IME) 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.<sup>18</sup>

OWCP’s procedures provide that, if a case has been referred to an IME to resolve a conflict regarding permanent impairment, it is unnecessary to route the file to a DMA as long as the IME

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<sup>12</sup> A.M.A., *Guides* 3 (6<sup>th</sup> ed. 2009), section 1.3.

<sup>13</sup> *Id.* at 383-492.

<sup>14</sup> *Id.* at 411.

<sup>15</sup> *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>16</sup> FECA Bulletin No. 17-06 (issued May 8, 2017); *see also W.H.*, Docket No. 19-0102 (issued June 21, 2019).

<sup>17</sup> 5 U.S.C. § 8123(a); *see also* 20 C.F.R. § 10.321.

<sup>18</sup> *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020).

explains his or her impairment rating and cites to the appropriate tables and the A.M.A., *Guides*. The DMA should not resolve the conflict in medical opinion.<sup>19</sup>

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence, and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>20</sup> If the referral physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new impartial medical examination.<sup>21</sup>

### ANALYSIS

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

OWCP found that a conflict in the medical evidence existed between appellant's attending physician, Dr. Macht, who found 6 percent permanent impairment of the left upper extremity and 15 percent permanent impairment of the left lower extremity, and OWCP referral physician, Dr. Steuart, who found 12 percent permanent impairment of the left upper extremity and 0 percent permanent impairment of the left lower extremity.

In order to resolve the conflict, OWCP properly referred appellant to Dr. Zamani for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a). In a report dated April 30, 2019, Dr. Zamani noted her history of injury and treatment, utilized the fourth edition of the A.M.A., *Guides*,<sup>22</sup> and determined that she had 0 percent permanent impairment of the left lower extremity and 10 percent permanent impairment of the left upper extremity. Based upon his opinion, on July 15, 2019 OWCP granted appellant a schedule award for 10 percent permanent impairment of the left lower extremity, and 0 percent permanent impairment of the left upper extremity.

However, in a July 16, 2020 decision, OWCP's hearing representative set aside the July 15, 2019 OWCP decision. The hearing representative found that Dr. Zamani incorrectly used the fourth edition of the A.M.A., *Guides*, and directed OWCP to further develop the medical evidence and to issue a new decision. OWCP's hearing representative explained that, upon return of the case record, OWCP should seek clarification from Dr. Zamani using the sixth edition of the A.M.A., *Guides*, for both the left upper and lower extremities. Furthermore, Dr. Zamani's report should be reviewed by the DMA to assure the correct application of the A.M.A., *Guides*. However, OWCP did not seek clarification from him, and instead sent appellant for a new impartial medical examination with Dr. Saltzman. No explanation for the failure to request clarification from Dr. Zamani is noted in the record, and it is unclear why she was sent to Dr. Saltzman without first requesting clarification from Dr. Zamani.

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<sup>19</sup> See *supra* note 10 at Chapter 2.808.6g (March 2017); see also *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

<sup>20</sup> *W.H.*, Docket No. 16-0806 (issued December 15, 2016); *Harold Travis*, 30 ECAB 1071, 1078 (1979); *supra* note 10 at Chapter 2.810.11e (September 2010).

<sup>21</sup> *Id.*; see also *R.W.*, Docket No. 18-1457 (issued February 1, 2019).

<sup>22</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

OWCP procedures provide that:

“If the referee specialist submits an opinion which is equivocal, lacks rationale, or fails to address the specified medical issues or conflict, the CE [claims examiners] should seek clarification or further rationale from that physician. When OWCP undertakes to develop the evidence by referring the case to an [OWCP]-selected physician, it has an obligation to seek clarification from that physician upon receiving a report that did not adequately address the issues that [OWCP] sought to develop. As such, the CE [claims examiners] should seek clarification from the referee physician and request a supplemental report to clarify specifically noted discrepancies or inadequacies in the initial report.

“Only if the referee physician does not respond, or does not provide a sufficient response after being asked, should the CE [claims examiners] request a new referee examination.”<sup>23</sup>

The Board has held that the exclusion of a medical report obtained from a designated IME is required under specific circumstances.<sup>24</sup> In *Joseph R. Alsing*,<sup>25</sup> the Board excluded the medical report from a second impartial medical specialist, which was obtained prior to any attempt to have the original medical referee clarify his medical opinion. The Board stated: “Since the report was improperly obtained, it will not be given any weight on review by the Board and should not be considered by [OWCP].” The Board in *Alsing* remanded the case to OWCP to obtain a clarification report from the first impartial medical specialist and to issue a *de novo* decision.<sup>26</sup>

Consequently, Dr. Saltzman’s report must be excluded from consideration as it was obtained before OWCP sought clarification from Dr. Zamani.<sup>27</sup>

The case will be remanded to OWCP for further development of the medical evidence to include seeking clarification from Dr. Zamani, the original IME, to resolve the conflict regarding the extent of appellant’s permanent impairment. If OWCP is unable to obtain clarification from Dr. Zamani, then OWCP should refer her to a second IME to resolve the conflict of opinion. After such other further development as OWCP deems necessary, it shall issue a *de novo* decision.

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<sup>23</sup> See *E.M.*, Docket No. 13-1876 (issued March 26, 2014); see also *supra* note 10 at Chapter 2.810.11e (September 2010).

<sup>24</sup> See *Terrance R. Stath*, 45 ECAB 412 (1994).

<sup>25</sup> *Joseph R. Alsing*, 39 ECAB 1012 (1988); *Jeannine E. Swanson*, 45 ECAB 325 (1994); see *W.H.*, *supra* note 20.

<sup>26</sup> *Id.*; see also *Kim Law-Jackson*, Docket No. 03-2075 (issued November 26, 2003) (where the Board found that OWCP erred when it failed to follow the instructions of the Board and obtain clarification of a report from the first IME prior to referring appellant to another IME). See also *supra* note 10 at Chapter 2.810.12a(2) (September 2010); *Terrance R. Stath*, *supra* note 24.

<sup>27</sup> See *Terrance R. Stath*, *id.* (the Board distinguished situations where medical reports were excluded because OWCP might have influenced the opinion of an impartial medical specialist from circumstances in which the medical report obtained was defective for other procedural reasons). See also *id.* at Chapter 2.810.12 (September 2010).



**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 25, 2021 decision of the Office of Workers' Compensation Programs is set aside and remanded for proceedings consistent with the decision of the Board.

Issued: March 6, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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