

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

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C.R., Appellant )

and )

DEPARTMENT OF JUSTICE, EXECUTIVE )  
OFFICE FOR IMMIGRATION REVIEW, )  
Los Angeles, CA, Employer )

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**Docket No. 21-1084  
Issued: December 29, 2021**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On July 12, 2021 appellant filed a timely appeal from a May 7, 2021 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>

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

<sup>2</sup> The Board notes that appellant submitted additional evidence following the May 7, 2021 decision and on appeal. However, the Board's *Rules of Procedures* 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 that she has reached maximum medical improvement (MMI) for the purpose of receiving an increased schedule award.

## FACTUAL HISTORY

On April 6, 2010 appellant, then a 43-year-old legal clerk and technician, filed an occupational disease claim (Form CA-2) alleging that she sustained a bilateral hand condition causally related to repetitive duties of her federal employment. OWCP accepted the claim, assigned OWCP File No. xxxxxx409, for bilateral tenosynovitis of the hand and wrist.<sup>3</sup>

On June 30, 2017 appellant requested that OWCP refer her for an impairment evaluation.

OWCP, on August 14, 2017, referred appellant to Dr. Mark Bernhard, an osteopath, for a second opinion evaluation regarding the extent of any permanent impairment.

In a report dated August 30, 2017, Dr. Bernhard found that appellant had no more than the previously awarded 14 percent permanent impairment of the right upper extremity due to shoulder bursitis. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>4</sup> he found two percent permanent impairment of the each upper extremity due to tenosynovitis of the wrists according to Table 15-3 on page 395.

On October 23, 2017 Dr. Nelson S. Haas, Board-certified in occupational medicine and serving as a district medical adviser (DMA), opined that appellant had no impairment due to bilateral wrist tenosynovitis due to inconsistencies in presentation and the lack of objective findings on examination.

On September 12, 2018 OWCP referred appellant to Dr. Frederick Nicola, a Board-certified orthopedic surgeon, for a second opinion examination regarding the extent of her employment-related permanent impairment of the upper extremities.

In a report dated October 4, 2018, Dr. Nicola diagnosed status post right shoulder impingement, status post right dorsal wrist ganglion excision, and bilateral wrist forearm intersection syndrome. He found that appellant had two percent permanent impairment of the wrists due to sprain/strain that included intersection syndrome and nonspecific tendinitis, according to Table 15-3 of the A.M.A., *Guides*.

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<sup>3</sup> OWCP previously accepted that appellant sustained right shoulder bursitis on April 10, 2008, assigned OWCP File No. xxxxxx442. Under OWCP File No. xxxxxx442, by decision dated October 30, 2013, it granted appellant a schedule award for 14 percent permanent impairment of the right upper extremity. OWCP additionally accepted that appellant sustained left shoulder strain on July 29, 2008, assigned OWCP File No. xxxxxx468. It combined File Nos. xxxxxx442, xxxxxx468, and xxxxxx409, with the latter serving as the master file.

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

On February 26, 2019 OWCP expanded its acceptance of the claim to include bilateral wrist forearm intersection syndrome.

On May 19, 2019 Dr. Haas found that appellant had no impairment due to loss of ROM of the elbow, forearm, or wrists and that she had already received an award for an impairment of the right shoulder due to loss of ROM. He further found no impairment using the DBI rating method due to inconsistencies on examination.

In a state workers' compensation progress report form dated November 21, 2019, Dr. Pamela Wei-Yung Law, a Board-certified physiatrist, diagnosed tendinitis of the bilateral wrists and of the extensor tendon of the right hand. She indicated that appellant had reached maximum medical improvement (MMI) on July 13, 2012 and required restrictions and future medical care.

On December 23, 2019 OWCP referred appellant to Dr. Richard A. Rogachefsky, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of any employment-related permanent impairment.

In a report dated January 13, 2020, Dr. Rogachefsky reviewed appellant's history of injury and provided ROM measurements for the wrists. He diagnosed bilateral carpal tunnel syndrome due to cumulative work trauma in 2009 caused by lifting heavy files repetitively. Dr. Rogachefsky advised that appellant had a positive Tinel's sign of the right wrist and reviewed her complaints of bilateral hand numbness and tenderness. He related, "I am recommending the claimant have an updated electromyogram (EMG) and nerve conduction velocity (NCV) study to rule out right and left carpal tunnel syndrome recurrence. The claimant should have a course of occupational therapy and acupuncture of the right and left hands and wrist [two] times a week for [six] weeks." Dr. Rogachefsky advised that he would submit a supplemental report after the diagnostic testing.

An EMG/NCV study performed on June 29, 2020 revealed evidence of mild bilateral median mononeuropathies at the wrist.

On August 13, 2020 OWCP requested that Dr. Law review Dr. Rogachefsky's January 13, 2020 report, address any areas of disagreement, and provide an opinion on whether appellant's condition was permanent and stationary. It afforded her 30 days to submit the requested information.

By decision dated October 22, 2020, OWCP denied appellant's claim for an increased schedule award. It found that Dr. Rogachefsky's report represented the weight of the evidence and established that she had not yet reached MMI.

In a state workers' compensation progress report form dated October 23, 2020, Dr. Law diagnosed bilateral wrist tendinitis and tendinitis of the right hand extensor tendon. In accompany treatment notes dated October 22, 2020, she found a positive Finklestein's test bilaterally and noted that a June 29, 2020 NCV study had shown bilateral carpal tunnel syndrome. Dr. Law recommended occupational therapy, which she noted that appellant had declined due to the COVID-19 pandemic. She indicated that appellant's work status before this visit was "MMI, working permanent modified duty."

On November 23, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated January 5, 2021, OWCP denied appellant's request for an oral hearing finding that it was untimely under 5 U.S.C. § 8124(b).

On February 8, 2021 appellant requested reconsideration.

By decision dated May 7, 2021, OWCP denied modification of its October 22, 2020 decision.

### **LEGAL PRECEDENT**

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs, or functions of the body.<sup>5</sup> Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the sixth edition of the A.M.A., *Guides*.<sup>6</sup>

The Board has explained that permanent impairment may only be rated according to the A.M.A., *Guides* after MMI has been achieved.<sup>7</sup> An impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur.

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI has been reached is a factual one that depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.<sup>8</sup> The date of MMI is usually considered to be the date of the medical examination that determined the extent of the permanent impairment.<sup>9</sup>

### **ANALYSIS**

The Board finds that appellant has not met her burden of proof to establish that she has reached MMI for the purpose of receiving an increased schedule award.

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<sup>5</sup> *Supra* note 1 at § 8107.

<sup>6</sup> 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 – Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017).

<sup>7</sup> *See M.J.*, Docket No. 18-0425 (issued September 7, 2018); *A.D.*, Docket No. 17-1996 (issued March 5, 2018).

<sup>8</sup> *S.M.*, Docket No. 18-0837 (issued January 11, 2019); *see D.S.*, Docket No. 15-1244 (issued August 24, 2015).

<sup>9</sup> *See A.D.*, *supra* note 7; *W.S.*, Docket No. 16-0344 (issued April 4, 2016).

As noted, a schedule award cannot be determined and paid until a claimant reaches MMI. MMI refers to a date that the medical condition has become static and well-stabilized.<sup>10</sup> Once impairment has reached MMI, a permanent impairment rating may be performed.<sup>11</sup>

OWCP referred appellant to Dr. Rogachefsky for a second opinion examination regarding the extent of her employment-related permanent impairment. On January 13, 2020 Dr. Rogachefsky discussed her complaints of bilateral hand numbness and tenderness. He diagnosed bilateral carpal tunnel syndrome due to lifting heavy files repetitively. Dr. Rogachefsky found a positive Tinel's sign of the right wrist. He referred appellant for diagnostic testing to rule out a recurrence of bilateral carpal tunnel syndrome. Dr. Rogachefsky opined that she required a six-week course of occupational therapy and acupuncture of the bilateral hands and wrists. As he found that appellant needed further therapy to treat her current symptoms, his opinion fails to support that she has reached MMI.<sup>12</sup>

OWCP requested that Dr. Law review and comment on Dr. Rogachefsky's report. In a progress report dated October 22, 2020, Dr. Law found a positive Finklestein's test bilaterally and noted that a June 29, 2020 NCV study had shown bilateral carpal tunnel syndrome. She suggested occupational therapy, which appellant declined because of the COVID-19 pandemic.<sup>13</sup> Dr. Law indicated that appellant's work status was MMI and she was performing modified duty. She did not, however, directly address whether appellant was at MMI for the purpose of a schedule award, rather than for the designation of work limitations. Dr. Law further concurred with Dr. Rogachefsky's opinion that she required occupational therapy. As both Dr. Law and Dr. Rogachefsky recommended further medical treatment to improve appellant's condition, OWCP properly determined that entitlement to schedule award was not established as MMI had not been reached.<sup>14</sup>

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

### CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she has reached MMI for the purpose of receiving an increased schedule award.

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<sup>10</sup> A.M.A., *Guides* 24.

<sup>11</sup> *Id.*; see *A.D.*, *supra* note 7.

<sup>12</sup> *A.D.*, *id.*

<sup>13</sup> If a claimant declines therapy, that decision does not preclude an impairment evaluation; however, the physician should provide written comments regarding the suitability of the therapy, the basis of the refusal, and provide a finding that the claimant is at MMI without treatment as a result of noncompliance. A.M.A., *Guides* 24.

<sup>14</sup> *A.D.*, *supra* note 7; see also *B.C.*, Docket No. 16-1061 (issued November 18, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 7, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 29, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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