United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 16-0981**
	)	**Issued: August 29, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Manhattan, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 8, 2016 appellant, through counsel, filed a timely appeal from a February 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established that she sustained permanent impairment due to her accepted sprain of the right shoulder and upper arm.

[1] 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 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.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a May 27, 2015 decision, the Board set aside in part and affirmed in part OWCP's overpayment decision dated September 2, 2014 and affirmed an October 30, 2014 OWCP decision denying a prerecoupment hearing.[3] The Board found that appellant received an overpayment of compensation from April 3 to May 4, 2013 when she received wage-loss compensation after she returned to work. The Board further found that she was without fault for that portion of the overpayment covering April 3 to 6, 2013, but that she was at fault in creating that portion of the overpayment occurring from April 7 to May 4, 2013. The Board remanded the matter for consideration of waiver of the recovery of the overpayment from April 3 to 6, 2013. The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are set forth below.

Relevant facts include that on December 5, 2011 appellant, then a 35-year-old letter carrier, injured her right arm while delivering a package on her mail route. OWCP accepted her claim for right shoulder and upper arm sprain. Appellant stopped work on December 5, 2011 and received appropriate wage-loss compensation.

Appellant came under the treatment of Dr. Molly D'Costa, an osteopath, on December 5, 2011 until April 30, 2012 for right shoulder pain and biceps tendinitis. She reported delivering a 70-pound parcel and while removing the package from her vehicle she felt a pull in her right shoulder and experienced radiating pain down to her right wrist. Dr. D'Costa diagnosed right shoulder sprain and strain and returned appellant to work with a lifting restriction. A magnetic resonance imaging (MRI) scan of right shoulder dated December 29, 2011 revealed rotator cuff tendinopathy without full-thickness tear or tendon retraction. A January 9, 2012 MRI scan of the right shoulder revealed rotator cuff tendinopathy without full-thickness tear or tendon retraction.

Thereafter, in the course of developing the claim, OWCP referred appellant to a second opinion physician and also to an impartial medical examiner. It sought to determine whether appellant's accepted conditions had resolved and whether she could return to work regular duty or with restrictions.

On October 6, 2014 OWCP issued a notice of proposed termination of compensation and medical benefits as the impartial medical examiner's report dated July 7, 2014 established no residuals of the work-related employment conditions.[4]

On October 6, 2014 appellant filed a claim for a schedule award (Form CA-7). By letter dated October 17, 2014, OWCP informed appellant that she should provide a physician's assessment, based on loss of function of the upper extremities, in accordance with the sixth

[3] Docket No.15-0265 (issued May 27, 2015).

[4] OWCP based its proposed termination on the report of Dr. Michael J. Cohen, a Board-certified orthopedic surgeon acting as an impartial medical examiner. In a July 7, 2014 report, Dr. Cohen noted findings and opined that appellant had fully recovered from her accepted right shoulder sprain and needed no further treatment. He advised that her objective findings did not correlate to her subjective symptoms.

edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).[5] She was provided 30 days to respond.

By decision dated October 27, 2014, OWCP terminated appellant's wage-loss compensation and medicine benefits effective the same date, finding that the weight of the medical evidence established that appellant had no residuals or continuing disability resulting from her accepted employment injury.

Appellant submitted a report from Dr. Ryan Pizinger, a Board-certified orthopedist, dated October 20, 2014, who treated her for a right shoulder lifting injury sustained at work on November 30, 2011. A right shoulder x-ray revealed no acute fractures, type 2 acromion, and mild acromioclavicular arthropathy. A cervical spine x-ray showed mild-to-moderate disc degeneration from C5-6 and C6-7, osteophyte formation, and facet hypertrophy. Dr. Pizinger recommended a magnetic resonance arthrogram and an MRI scan of the cervical spine. On December 8, 2014 he noted that appellant was unable to return to work.

By decision dated May 1, 2015, OWCP denied appellant's claim for a schedule award. It noted that she did not respond to its October 17, 2014 development letter and that her FECA benefits had been terminated on October 27, 2014.

On May 6, 2015 appellant requested a telephone hearing which was held before an OWCP hearing representative on December 16, 2015. She submitted a report from Dr. Pizinger dated April 28, 2015, who noted that appellant was under his care and was unable to return to work. Dr. Pizinger noted restrictions of no lifting, pulling, pushing, carrying over zero pounds and no sudden head or neck movements.

On November 17, 2015 appellant, through counsel, submitted an impairment rating from Dr. Neil Allen, a Board-certified neurologist and internist, dated October 23, 2015. Counsel requested that Dr. Allen's impairment rating be forwarded to an OWCP medical adviser.

In a report dated October 23, 2015, Dr. Allen noted a history of injury and medical treatment and listed her complaints of right shoulder pain and low back pain. Right shoulder findings included antalgic posture, global tenderness, intact light touch and sharp/dull discrimination, intact brachial and radial pulses, and 4/5 external muscle strength in the rotators and biceps. Dr. Allen noted that range of motion on the right was 140 degrees for flexion, 50 degrees for extension, 100 degrees for abduction, 60 degrees for adduction, 40 degrees for internal rotation and 65 degrees for external rotation. He diagnosed complete right rotator cuff rupture and right shoulder and upper arm sprain. Dr. Allen advised that appellant had reached maximum medical improvement. He rated permanent impairment evaluation using the diagnosis-based impairment method. Dr. Allen noted that pursuant to the Shoulder Regional Grid, Table 15-5, page 402 of the A.M.A., *Guides*, based on the historical data and medical records, appellant had a class one impairment with a default value of three percent upper extremity impairment. For the functional history adjustment, Table 15-7, page 406, appellant had a *Quick*DASH score of 64, she reported pain with normal activity and was able to perform self-care activities with modification but unassisted. Dr. Allen noted that appellant qualified for

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

a grade 2 modifier for functional history. For physical examination adjustment, Table 15-8, page 408, appellant had moderate palpatory findings, consistently documented with observed abnormalities, stable, mild motion deficit, mild alteration in alignment/deformity and no muscle atrophy. Dr. Allen noted that appellant qualified for a grade 2 modifier. For clinical studies adjustment, Table 15-8, page 408, x-rays of the right shoulder revealed no apparent bone or joint abnormalities and no fractures. A right shoulder MRI scan revealed mild rotator cuff tendinopathy without a full-thickness tear or tendon retraction with a type 2 anterior acromion process present. An MRI scan of the right shoulder with contrast revealed a partial thickness longitudinal intrasubstance tear of the distal supraspinatus tendon. Dr. Allen noted that this qualified for a grade modifier of 2 but it was not considered in adjustment as it was used as a key factor to determine class placement. He opined that based on the net adjustment formula on page 411 of the A.M.A., *Guides* appellant had four percent right arm impairment.

At the December 16, 2015 telephonic hearing, appellant's counsel referenced the recent submission of Dr. Allen's October 23, 2015 report containing an impairment rating and requested that Dr. Allen's impairment evaluation be forwarded to an OWCP medical adviser.

By decision dated February 10, 2016, an OWCP hearing representative found the medical evidence of record insufficient to establish permanent impairment and affirmed the May 1, 2015 decision. He noted that Dr. Allen failed to acknowledge reports from the second opinion physician or the impartial medical examiner. Additionally, Dr. Allen summarized the 2015 MRI scan, but he did not discuss whether the MRI scan findings represented a new pathology.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing federal regulations,[7] 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.[8] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[10] Under the sixth edition, for upper extremity impairments the evaluator

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id.* at § 10.404(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013) and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[10] A.M.A., *Guides*, 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

identifies the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[12] The grade modifiers are used on the net adjustment formula described above to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down the default value C, by the calculated net adjustment.[13]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[14]

ANALYSIS

OWCP accepted appellant's claim for right shoulder and upper arm sprain. The Board finds this case is not in posture for decision. Dr. Allen's October 23, 2015 report included an impairment rating for appellant's right upper extremity. He provided physical examination findings, he cited to tables and charts in the A.M.A., *Guides*, and provided an impairment rating pursuant to the A.M.A., *Guides.*

In this case, the hearing representative made a medical determination as to the injury appellant sustained not causing or contributing to any permanent impairment without the benefit of medical advice or review by an OWCP medical adviser. OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of any impairment in accordance with the A.M.A., *Guides*.[15] In this case, the medical evidence was not forwarded to an OWCP medical adviser for review. For these reasons, the February 10, 2016 decision will be set aside and the case remanded to OWCP for review of the medical record by an OWCP medical adviser. Following such development as OWCP deems necessary, it shall issue a *de novo* merit decision.[16]

CONCLUSION

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

[11] *Id.* at 385-419.

[12] *Id.* at 411.

[13] *Id*.

[14] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[15] *Id.* at Chapter 2.808.6(d) (August 2002).

[16] *See B.M.*, 09-2231 (issued May 14, 2010) (where the Board set aside OWCP's decision denying appellant's request for a schedule award and determined that it was improper for OWCP to render a decision without the benefit of medical advice from or review by its medical adviser).

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision.

Issued: August 29, 2016
Washington, DC

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

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

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