

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

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**B.W., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS HEALTH ADMINISTRATION,  
Chillicothe, OH, Employer**

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**Docket No. 16-1193  
Issued: December 1, 2016**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 16, 2016 appellant, through counsel, filed a timely appeal from an April 11, 2016 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.

**ISSUE**

The issue is whether appellant met her burden of proof to establish permanent impairment warranting a schedule award.

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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 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.*

This case has previously been before the Board.

### **FACTUAL HISTORY**

OWCP accepted that on December 22, 2004 appellant, then a 53-year-old food service worker, sustained a lumbar strain, left shoulder strain, and low back contusion due to falling on an icy sidewalk at work. Appellant did not stop work around the time of her December 22, 2004 injury, but she performed limited-duty work for the employing establishment.<sup>3</sup>

By decision dated February 24, 2014,<sup>4</sup> the Board affirmed OWCP's August 1, 2013 decision denying appellant's disability claim. The facts and circumstances surrounding the prior appeal are incorporated herein by reference. The relevant facts follow.

On July 22, 2014 appellant filed a claim for compensation (Form CA-1) claiming a schedule award due to her accepted work conditions.

In an October 7, 2014 report, Dr. Catherine Watkins-Campbell, an attending Board-certified family practitioner, determined that appellant had two percent permanent impairment of her left arm under the standard of the sixth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (A.M.A., *Guides*). She listed appellant's accepted conditions of back contusion, lumbar sprain, and left shoulder sprain and detailed findings of her October 7, 2014 physical examination. Dr. Watkins-Campbell noted that appellant completed a pain diagram in which she reported having pain in her right lower lumbar and right gluteal areas, and numbness and pins and needles sensation in her back right leg, right forearm, and right hand. She noted range of motion measurements for appellant's back and left shoulder and noted that she reported mild acromioclavicular tenderness in her left shoulder on palpation with no crepitation, atrophy, swelling, or instability.

Dr. Watkins-Campbell explained that, under Table 15-5 on page 401 of the sixth edition of the A.M.A., *Guides*, appellant's left upper extremity condition fell under the diagnosis-based impairment category of sprain/strain without consistent objective findings and that she had a default value of one percent impairment of the left upper extremity. She noted that appellant had a functional history grade modifier of 2, a physical examination grade modifier of 1, and that the clinical studies grade modifier was not applicable. Dr. Watkins-Campbell concluded that these values required shifting one space to the right of the default value on Table 15-5 such that appellant had two percent permanent impairment of her left upper extremity.

On April 29, 2015 OWCP forwarded the medical evidence on file, including the October 7, 2014 report of Dr. Watkins-Campbell and a statement of accepted facts, to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, for evaluation of appellant's permanent impairment.

In a report dated April 30, 2015, Dr. Slutsky determined that appellant had zero percent permanent impairment of her left upper extremity under the standards of the sixth edition of the

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<sup>3</sup> The record reveals that appellant has not received disability compensation on the daily or periodic rolls.

<sup>4</sup> Docket No. 13-2061 (issued February 24, 2014).

A.M.A., *Guides*. He noted that on October 10, 2008, *i.e.*, almost four years after the December 22, 2004 work injury, appellant was examined by Dr. Gula who reported a normal examination with no objective clinical findings to support the ongoing presence of the accepted conditions. Dr. Slutsky indicated that Dr. Gula reported that appellant's subjective complaints could not be confirmed by objective clinical findings. He pointed out that Dr. Lefkowitz concurred with this opinion on June 25, 2009 when he noted that shoulder strains typically resolve within three months. Dr. Slutsky indicated that the only left shoulder diagnostic test was performed on May 14, 2009 and that this test was completely normal. He noted that medical treatment after these dates related to the lumbar spine, not the left shoulder. Dr. Slutsky indicated, "As such, the claimant was thoroughly evaluated by two physicians who found that the claimant had no residuals from the accepted left shoulder sprain. Dr. Watkins-Campbell's rating is unrelated in any way to the accepted conditions in this case as they had resolved [six] years prior to this evaluation." He concluded that appellant had no permanent impairment of her left upper extremity.

On May 13, 2015 in order to resolve the discrepancy in the permanent partial impairment ratings provided in the October 7, 2014 report of Dr. Watkins-Campbell and the April 30, 2015 report of Dr. Slutsky, OWCP wrote to Dr. Watkins-Campbell and requested that she comment on the issues raised in Dr. Slutsky's medical report and provide an updated report with a final rating of the permanent impairment.

Counsel noted in a May 28, 2015 letter that Dr. Watkins-Campbell would not be able to respond to OWCP's May 13, 2015 correspondence. He requested that OWCP process appellant's schedule award claim.

In a June 24, 2015 decision, OWCP determined that appellant had failed to meet her burden of proof to establish permanent impairment of her left arm. It found that Dr. Slutsky properly noted in his report that Dr. Watkins-Campbell's impairment rating was not based on permanent residuals of the December 22, 2004 work injury.

Appellant requested a telephone hearing with an OWCP hearing representative. During the hearing held on February 3, 2016, counsel argued that the opinion of Dr. Watkins-Campbell established appellant's permanent impairment.

By decision dated April 11, 2016, OWCP's hearing representative affirmed OWCP's June 24, 2015 decision denying appellant's claim for a schedule award. The hearing representative found that appellant had not submitted rationalized medical evidence showing that she had work-related permanent impairment and that Dr. Slutsky had properly found that she had no such impairment.

### **LEGAL PRECEDENT**

The schedule award provision of the FECA<sup>5</sup> and its implementing regulations<sup>6</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404 (1999).

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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>7</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>8</sup>

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the Class of Diagnosis (CDX) is determined from the Shoulder Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the Grade Modifier for Functional History (GMFH), Grade Modifier for Physical Examination (GMPE) and Grade Modifier for Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>9</sup>

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.<sup>10</sup> The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>11</sup>

### ANALYSIS

OWCP accepted that on December 22, 2004 appellant sustained a lumbar strain, left shoulder strain, and low back contusion due to falling on an icy sidewalk at work. Appellant filed a claim for compensation (Form CA-7) claiming a schedule award due to her accepted work

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<sup>7</sup> *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

<sup>8</sup> *Id.* at Part 2, Chapter 2.808.5a (February 2013); see also *id.* at Part 3, Chapter 3.700, Exhibit 1 (January 2010).

<sup>9</sup> See A.M.A., *Guides* (6<sup>th</sup> ed. 2009) 401-11. Table 15-5 also provides that, if motion loss is present for a claimant who has undergone a shoulder arthroplasty, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Such a range of motion impairment stands alone and is not combined with a diagnosis-based impairment. *Id.* at 405, 475-78.

<sup>10</sup> See *Bobbie F. Cowart*, 55 ECAB 476 (2004).

<sup>11</sup> *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

conditions. In decisions dated June 24, 2015 and April 11, 2016, OWCP denied appellant's claim for a schedule award, noting that the denial was supported by the opinion of Dr. Slutsky, OWCP's medical adviser.

The Board finds that appellant failed to meet her burden of proof to establish permanent impairment sufficient to warrant a schedule award.

In an October 7, 2014 report, Dr. Watkins-Campbell, an attending physician, determined that appellant had two percent permanent left arm impairment under the sixth edition of the A.M.A., *Guides*. She noted that, under Table 15-5 on page 401 of the A.M.A., *Guides*, appellant's left arm condition fell under the diagnosis-based impairment category of sprain/strain without consistent objective findings and that she had a default value of one percent impairment of the left upper extremity. Dr. Watkins-Campbell indicated that appellant's grade modifier scores required shifting one space to the right of the default value on Table 15-5 such that appellant had two percent permanent impairment of her left upper extremity.<sup>12</sup>

The Board finds that OWCP properly found that the October 7, 2014 report of Dr. Watkins-Campbell failed to support permanent impairment of the left upper extremity. As noted above, an employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.<sup>13</sup> Although Dr. Watkins-Campbell described left shoulder deficits, she did not provide a rationalized medical opinion explaining how the permanent impairment was related to the accepted December 22, 2004 work injury. Such medical rationale is especially necessary given the multiple medical reports of record showing that appellant ceased to have any residuals of her December 22, 2004 work injury by the time of the impairment evaluation of Dr. Watkins-Campbell.

The Board finds that Dr. Slutsky provided an extensive rationalized discussion explaining why appellant did not have permanent impairment related to residuals of the December 22, 2004 work injury. In a report dated April 30, 2015, Dr. Slutsky determined that appellant had no permanent impairment of her left arm under the standards of the sixth edition of the A.M.A., *Guides*. He noted that on October 10, 2008, *i.e.*, almost four years after the December 22, 2004 date of injury, appellant was examined by Dr. Gula who reported a normal examination with no objective clinical findings to support the ongoing presence of the accepted work-related conditions. Dr. Slutsky pointed out that Dr. Lefkowitz concurred with this opinion on June 25, 2009 when he noted that shoulder strains typically resolve within three months. He indicated that the only left shoulder diagnostic test was performed on May 14, 2009 and that this test was completely normal. Dr. Slutsky indicated, "As such, the claimant was thoroughly evaluated by two physicians who found that the claimant had no residuals from the accepted left shoulder condition. Dr. Watkins-Campbell's rating is unrelated in any way to the accepted conditions in this case as they had resolved [six] years prior to this evaluation."

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<sup>12</sup> See *supra* note 12.

<sup>13</sup> See *supra* note 13.

On appeal counsel argues that the impairment rating opinion of Dr. Watkins-Campbell was “relevant, probative, and timely,” but the Board has explained why her opinion has limited probative value regarding appellant’s permanent impairment. He asserts that OWCP’s schedule award decision was “based on stale evidence,” but he did not provide any further clarification of the basis for this statement.

For these reasons, that Board finds that appellant did not meet her burden of proof to establish permanent impairment warranting a schedule award. She may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

**CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish entitlement to schedule award compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 11, 2016 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: December 1, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees’ Compensation Appeals Board

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