United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 14-1566**
	)	**Issued: April 4, 2017**
DEPARTMENT OF THE INTERIOR, GRAND CANYON NATIONAL PARK, Grand Canyon, AZ, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2014 appellant filed a timely appeal from a May 14, 2014 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 this case.

[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.*

ISSUE

The issue is whether appellant has more than two percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On September 5, 2009 appellant, then a 59-year-old assistant packer, filed a traumatic injury claim (Form CA-1) alleging that, on August 26, 2009, he sustained scrapes to his head, right shoulder pain, bruises to the groin, and a swollen right hand as a result of being thrown into a gate by a mule. OWCP accepted his claim for a right rotator cuff tear on February 10, 2010.

On March 19, 2010 Dr. Yuri Lewicky, a Board-certified orthopedic surgeon, performed a right arthroscopic rotator cuff repair, subacromial decompression and acromioplasty with extensive glenohumeral debridement on appellant's right shoulder, with no known complications. Appellant stopped work on March 19, 2010 and returned to modified duty on May 18, 2010, with work restrictions of no lifting, climbing or overhead work. His appointment term with the employing establishment ended on November 25, 2010.

In a report dated September 2, 2010, Dr. Lewicky noted that appellant was 24 weeks postsurgery and that he was still unable to lift 50 pounds overhead. Appellant noted that his left shoulder was more bothersome than the right shoulder, and that he had a partial articular-sided tear to the left as well. On physical examination, Dr. Lewicky found that on the right appellant had 175 degrees of abduction; 105 degrees of cross-arm adduction; 65 degrees of extension; 165 degrees of forward flexion; 95 degrees of internal rotation; 80 degrees of external rotation; and positive Hawkin's and Neer's tests. He stated that appellant had reached maximum medical improvement and that based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] he had one percent permanent impairment of the right upper extremity, which equated to a one percent whole person impairment. In a follow-up report dated September 27, 2010, Dr. Lewicky reiterated that appellant had one percent permanent impairment of the right upper extremity and stated that appellant also had one percent permanent impairment of the left upper extremity.

On November 15, 2010 appellant filed a claim for a schedule award (Form CA-7).

Dr. Arthur S. Harris, an orthopedic surgeon and district medical adviser (DMA), reviewed the medical evidence of record on December 21, 2010. He found that appellant had residual symptoms in the right shoulder and mild limitation of motion without significant weakness. Dr. Harris referred to Table 15-5 on page 403 of the A.M.A., *Guides* and stated that appellant had a class 1 grade A right upper extremity permanent impairment. He concurred with Dr. Lewicky's date of maximum medical improvement of September 2, 2010.

By decision dated March 10, 2011, OWCP granted appellant a schedule award for one percent permanent impairment of his right arm. It noted that it had relied on the September 2,

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

2010 report of Dr. Lewicky and the December 21, 2010 report of Dr. Harris in calculating the schedule award.

In a report dated August 26, 2011, Dr. Mark Stephen Wilson, an orthopedic surgeon, examined appellant and provided an impairment rating.[4] On physical examination of the right shoulder, he noted that range of motion of the affected limb had been measured three consecutive times, with the greatest measurement recorded within the mean of 10 degrees. Dr. Wilson noted mild weakness in all planes, with tenderness to palpation over the anterior subacromial space. He observed that crepitation was palpable and audible upon passive and active range of motion. Dr. Wilson noted a positive impingement sign and supraspinatus press test. He stated that under the sixth edition of the A.M.A., *Guides*, appellant had 13 percent permanent impairment of the right shoulder due to chronic recurrent shoulder pain and loss of range of motion with weakness noted throughout the range of motion. Dr. Wilson stated that appellant was at maximum medical improvement and calculated impairment rating using the "range of motion" methodology. He stated:

> "Per Table 15-34 of the [A.M.A.,] *Guides*, [s]houlder [r]ange of [m]otion, flexion of 143 [degrees] (rounded to 140 [degrees]) = 3 [percent] UEI, extension to 50 [degrees] = 0 [percent] UEI, abduction to 130 [degrees] = 3 [percent] UEI, adduction to 30 [degrees] = 1 [percent] UEI; internal rotation to 40 [degrees] = 6 [percent] UEI, and external rotation to 70 [degrees] = 0 [percent] UEI. Total motion deficit obtained by adding values results in a 13 [percent] UEI. Referencing Table 15-35, Range of Motion Grade Modifiers, his 13 [percent] UEI is consistent with [g]rade modifier 2. Referencing Table 15-7, Functional History Adjustment: Upper Extremity, his *Quick*DASH of 46.2 is consistent with [g]rade modifier 2. His [f]unctional [h]istory, as defined in Table 15-7, was at [g]rade modifier 2, making the [r]ange of [m]otion [g]rade [m]odifier the same at [g]rade 2 as compared to the [f]unctional [h]istory [g]rade 2. Therefore, per Table 15-26, [f]unctional [h]istory [g]rade [a]djustment: [r]ange of [m]otion, his impairment remains at 13 [percent] UEI for the right shoulder. His range of motion measurements and secondary modifier adjustments were credible at the time of our evaluation and rating."

Appellant, by counsel, again filed a claim for a schedule award (Form CA-7) on October 3, 2011.

Dr. Ronald Blum, a Board-certified orthopedic surgeon and DMA, reviewed the medical evidence of record on May 2, 2013. He noted that Drs. Wilson and Lewicky provided conflicting information regarding the loss of range of motion of appellant's right shoulder, such that it could not be resolved with a review of the record. Dr. Blum further noted that Dr. Wilson made a mistake in calculating appellant's percentage of impairment for internal rotation according to Table 15-34 on page 475. He recommended an impairment evaluation from an appropriate Board-certified specialist that included the date of maximum medical improvement,

[4] Dr. Wilson's certification as an orthopedic surgeon could not be confirmed.

a detailed description of objective findings, recording of pertinent subjective findings, and an impairment rating calculated pursuant to the sixth edition A.M.A., *Guides*.

On July 22, 2013 OWCP requested a second opinion physician to provide the additional medical evidence recommended by Dr. Blum along with an impairment rating.

In a report dated August 12, 2013, Dr. Sofia M. Weigel, Board-certified in physical medicine and rehabilitation, stated that appellant had reached maximum medical improvement on August 26, 2011. On physical examination of appellant's right shoulder, she found a "near normal range of motion" with a mild impingement sign, a moderate painful arc, and mild pain over the acromioclavicular joint, with no pain over the bicipital tendon and a negative drop arm test. Applying the diagnosis-based impairment methodology, referencing Table 15-5 on page 402 of the A.M.A., *Guides*, for a partial thickness rotator cuff injury, Dr. Weigel found that appellant had a class 1, grade D upper extremity impairment. She noted grade modifiers of one for functional history due to pain with strenuous activity and ability to perform self-care; one for physical examination due to minimal palpatory findings without observed abnormality; and two for clinical studies based on a confirmed diagnosis of a partial rotator cuff tear. Dr. Weigel noted a *Quick*DASH score of 34. The default percentage of impairment for this diagnosis was one percent and the net adjustment was one, which resulted in a final rating of two percent right upper extremity permanent impairment.

Dr. Michael M. Katz, a Board-certified orthopedic surgeon and DMA, reviewed the medical evidence of record on September 23, 2013. He noted that Dr. Weigel's physical findings of near normal range of motion appeared to be consistent with the findings of Dr. Lewicky. Dr. Katz concurred with Dr. Weigel's calculation of appellant's percentage of impairment and date of maximum medical improvement, and noted that because appellant had previously been awarded one percent impairment of the right upper extremity, he was now due an additional award of one percent.

By decision dated September 27, 2013, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the right upper extremity. It noted that Dr. Blum had determined that Dr. Wilson's report was not probative and requested a second opinion evaluation. The percentage of impairment for this additional schedule award was determined by reference to the reports of Drs. Weigel and Katz.

On October 8, 2013 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

The hearing was held on March 12, 2014. At the hearing, appellant noted that he had two claims, one for the right shoulder and one for the left shoulder, but that he had not received any decision regarding his left shoulder. Appellant stated that his right shoulder had good range of motion, but that it would ache, if he put too much stress on it, which prevented him from laying stone for a living. He further noted that he had shoulder impingement that prevented him from reaching above his head. Regarding Dr. Weigel's physical examination, appellant stated, "Basically she asked me to lift my hands above my head which I did and then she reached up and caught my elbows and pushed them up further and that's pretty much all she did." He noted that this was the entire physical examination, and that Dr. Weigel had lifted his elbows to move his

hands "a little higher." Appellant stated that Dr. Weigel had not asked him to undress, take x-rays, rotate his arm or rotate his shoulder. The hearing representative noted that OWCP had undertaken significant medical development and recommended that appellant submit further medical evidence in support of an increased schedule award.

By decision dated May 14, 2014, OWCP's hearing representative affirmed the September 27, 2013 decision awarding appellant a schedule award for an additional one percent right upper extremity permanent impairment. He noted that Dr. Katz explained how appellant's two percent impairment was calculated in detail, and that Dr. Blum explained that Dr. Wilson's report could not be considered because it provided conflicting range of motion measurements and did not apply a table in the A.M.A., *Guides* correctly.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with Director of OWCP.[5] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[6] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[7]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[8] 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.[9]

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[5] *See* 20 C.F.R. §§ 1.1-1.4.

[6] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[7] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

[9] *Isidoro Rivera*, 12 ECAB 348 (1961).

ANALYSIS

The issue on appeal is whether appellant has more than two percent impairment of his right upper extremity, for which he received a schedule award.

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

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the diagnosis-based impairment or the range of motion methodology when assessing the extent of permanent impairment for schedule award purposes.[10] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[11] In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both diagnosis-based impairment and range of motion methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either range of motion or diagnosis-based impairment methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.[12]

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the May 14, 2014 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

[10] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

[11] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[12] *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.[13]

Issued: April 4, 2017
Washington, DC

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

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

[13] James A. Haynes, Alternate Judge, participated in the original decision, but was no longer a member of the Board effective November 16, 2015.