

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

T.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 16-0842
Issued: April 19, 2017**

Appearances:
*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 17, 2016 appellant, through counsel, filed a timely appeal from a November 13, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

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 met her burden of proof to establish that she has more than five percent impairment of the right upper extremity for which he previously received a schedule award.

FACTUAL HISTORY

On July 26, 2010 appellant, then a 53-year-old city carrier, injured her right elbow in a work-related fall. She fell while walking up steps. Appellant had mail in her left arm and used her right arm to try to prevent herself from falling. OWCP initially accepted the claim for right elbow contusion, but subsequently expanded the claim to include aggravation of preexisting right medial epicondylitis and right bicipital tenosynovitis.³ On January 19, 2012 appellant underwent OWCP-approved right elbow surgery. She received wage-loss compensation for temporary total disability through April 7, 2014, at which point appellant returned to work in a light/limited-duty capacity.

On December 10, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a September 11, 2014 report, Dr. David Weiss, a Board-certified orthopedic surgeon, diagnosed chronic post-traumatic right elbow medial and lateral epicondylitis and status post January 2012 right elbow lateral epicondylar debridement. He found that appellant had reached maximum medical improvement (MMI). Dr. Weiss reviewed appellant's medical records, performed a physical examination, and provided a right upper extremity impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*).⁴ Utilizing the diagnosis-based impairment (DBI) methodology, he rated appellant based on a diagnosis of right elbow lateral epicondylitis with surgery, citing Table 15-4, Elbow Regional Grid, A.M.A., *Guides* 399 (6th ed., 2009). The default rating (grade C) for the above-noted class 1 Class of Diagnosis (CDX 1) was five percent. Dr. Weiss assigned grade modifier 3 for Functional History (GMFH), grade modifier 2 for Physical Examination (GMPE), and grade modifier 2 for Clinical Studies (GMCS), and the net adjustment (+4) resulted in an increased upper extremity impairment of seven percent (grade E).⁵

On December 24, 2014 OWCP's district medical adviser (DMA), Dr. Morley Slutsky, Board-certified in occupational medicine, reviewed the claim and found appellant had five percent right upper extremity impairment under Table 15-4, A.M.A., *Guides* 399 (6th ed., 2009). He based his rating on the same diagnosis as Dr. Weiss, but disagreed with respect to the net adjustment, particularly regarding grade modifier 1 assigned for functional history and grade

³ Appellant also has a prior accepted claim (File No. xxxxxx594) for right elbow strain, right medial epicondylitis, and mild bicipital tendinitis, which occurred in the performance of duty on November 4, 2006.

⁴ On physical examination, Dr. Weiss noted, among other things, that right elbow range of motion (ROM) revealed flexion-extension of 0-145/145 degrees, pronation of 80/80 degrees, and supination of 80/80 degrees.

⁵ Net Adjustment (+4) = (GMFH 3 - CDX 1) + (GMPE 2 - CDX 1) + (GMCS 2 - CDX 1). See Section 15.3d, A.M.A., *Guides* 411 (6th ed., 2009).

modifier 0 assigned for physical examination. Dr. Slutsky found a net adjustment of 0, and thus, the appropriate rating under Table 15-4 was the default (grade C) upper extremity permanent impairment of five percent. As to the date of MMI, he identified April 22, 2014, which coincided with the findings of appellant's surgeon, Dr. Eon K. Shin, a Board-certified orthopedic surgeon.

By decision dated January 23, 2015, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity. The award covered a period of 15.6 weeks, from May 4 to August 21, 2014. OWCP relied on the Dr. Slutsky's December 24, 2014 impairment rating, noting that he "correctly applied the [A.M.A., *Guides*] to the examination findings."

On January 27, 2015 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review. A video hearing was held on August 28, 2015. Counsel argued that there was an unresolved conflict in medical opinion between Dr. Weiss and the DMA, Dr. Slutsky thereby warranting referral of the case to an impartial medical examiner.

By decision dated November 13, 2015, OWCP's hearing representative affirmed the prior schedule award decision.

On appeal counsel reiterates his contention that there is an unresolved conflict in medical opinion, thus requiring referral to an impartial medical examiner.

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 the Director of OWCP.⁶ 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.⁷ 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.⁸

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

⁶ See 20 C.F.R. §§ 1.1-1.4.

⁷ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁸ 20 C.F.R. § 10.404; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

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).⁹ 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.¹⁰

ANALYSIS

The issue on appeal is whether appellant has met her burden of proof to establish more than five percent permanent impairment of the right upper extremity for which she previously 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 DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹¹ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹² 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 DBI and ROM 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 ROM or DBI 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.¹³

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 November 13, 2015 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

⁹ 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).

¹⁰ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹² *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹³ *Supra* note 11.

deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 19, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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