United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
	)	
and	)	**Docket No. 16-1319**
	)	**Issued: April 25, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Elkins Park, PA, Employer	)	

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 13, 2016 appellant, through counsel, filed a timely appeal from a March 7, 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 this case.

ISSUE

The issue is whether appellant has more than six percent permanent impairment of each upper extremity, for which she previously received a schedule award.

[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

On May 15, 2012 appellant, then a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging bilateral carpal tunnel syndrome and bilateral thumb arthritis as a result of her federal employment. She alleged that her conditions resulted from repetitive motion of the arms, hands, and wrists in her federal employment.

In a report dated July 20, 2012, Dr. David Reinhardt, an osteopath, provided a history and results on examination. He diagnosed bilateral carpal tunnel syndrome causally related to appellant's federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome on August 7, 2012.

A statement of accepted facts (SOAF) dated April 9, 2012 identified two prior claims: a February 8, 2010 injury accepted for left elbow and shoulder contusions, and aggravation of spondylosis (OWCP File No. xxxxxx858), and a December 30, 2010 injury accepted for cervical and lumbar sprains (OWCP File No. xxxxxx952). Appellant also has two additional prior claims: a January 22, 1996 injury accepted for cervical sprain, (OWCP File No. xxxxxx971), and a December 5, 2008 claim accepted for temporary aggravation of cervical degenerative disc disease, and foraminal stenosis, (OWCP File xxxxxx132).

Appellant submitted an April 4, 2013 report from Dr. Nicholas Diamond, an osteopath, who provided a history with respect to carpal tunnel syndrome. Dr. Diamond provided results on examination. He opined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A. *Guides*), appellant had 14 percent right upper extremity permanent impairment. The right upper extremity permanent impairment was based on right ulnar and median nerve entrapment neuropathy and a diagnosis of right wrist degenerative joint disease. For the left upper extremity, Dr. Diamond opined that appellant had a 17 percent permanent impairment. The left upper extremity permanent impairment was based on left median nerve entrapment neuropathy, left shoulder range of motion (ROM) deficit, and left elbow bursitis.

OWCP prepared a SOAF dated July 11, 2013 and referred the case to an OWCP medical adviser, Dr. Arnold Berman, a Board-certified orthopedic surgeon. The SOAF noted appellant's previous claims for upper extremity injuries and the accepted conditions. In a report dated October 22, 2013, Dr. Berman opined that the only accepted condition was bilateral carpal tunnel syndrome, and the schedule award must be limited to this condition. The medical adviser opined that under Table 15-23 of the A.M.A. *Guides*, appellant had a six percent permanent impairment of each upper extremity.

By decision dated November 22, 2013, OWCP issued a schedule award for six percent permanent impairment of each upper extremity. The period of the award was 37.44 weeks from April 4, 2013.

On December 2, 2013 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on April 14, 2014. On April 22, 2014 appellant

submitted a report dated April 14, 2014 from Dr. Diamond.[3] Dr. Diamond opined that appellant had 14 percent right upper extremity permanent impairment based on entrapment neuropathy and the diagnosis of right wrist degenerative joint disease. For the left upper extremity, he opined appellant had 24 percent permanent impairment. The left upper extremity permanent impairment was based on left shoulder loss of motion, left biceps motor strength deficit, left elbow bursitis, and entrapment neuropathy of the left wrist.

By decision dated July 8, 2014, the hearing representative remanded the case. She found the evidence from Dr. Diamond was sufficient to warrant further development. OWCP was directed to prepare a SOAF that included all the prior upper extremity claims and thereafter to refer the case to an OWCP medical adviser.

Dr. Berman submitted a report dated December 17, 2014. He opined that there was no additional permanent impairment to appellant's upper extremities. Dr. Berman asserted that the July 20, 2012 report from Dr. Reinhardt did not establish bursitis, left shoulder loss of motion, or cervical radiculopathy.

By decision dated December 19, 2014, OWCP denied an additional schedule award. It found that the weight of the medical evidence was represented by Dr. Berman.

Appellant, through counsel, on January 7, 2015 requested a hearing before an OWCP hearing representative. By decision dated May 11, 2015, the hearing representative remanded the case for further development. She indicated that all prior accepted conditions to the upper extremities should be considered, and the case should be referred to an appropriate Board-certified specialist.

OWCP prepared a SOAF dated July 1, 2015. An OWCP memorandum dated August 6, 2015 found that there was a conflict in the medical evidence between Dr. Diamond and the OWCP medical adviser, Dr. Berman. OWCP selected Dr. Menachem Meller, a Board-certified orthopedic surgeon, as a referee physician.

In a report dated September 27, 2015, Dr. Meller reviewed appellant's medical history and results on examination. He reported "functional" motion of the shoulder, elbow, wrist, and hand. Dr. Meller wrote that appellant had neck and nerve-type complaints in the upper extremities with a history of polyneuropathy. He opined that the impairments treated by Dr. Diamond "other than the bilateral carpal tunnel syndrome would not be reasonable or apportioned through the work injuries accepted." Dr. Meller found that with respect to the bilateral carpal tunnel syndrome, the permanent impairment under Table 15-23 was six percent for each upper extremity.

By decision dated October 22, 2015, OWCP denied an additional schedule award for the upper extremities. It found the weight of the evidence rested with Dr. Meller.

Appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on February 3, 2016. Appellant submitted a February 23, 2016 report from

[3] The examination results appear to be from the April 4, 2013 examination.

Dr. Diamond. Dr. Diamond opined that appellant did have a history of cervical radiculopathy that should be incorporated in a permanent impairment evaluation. He opined that appellant had 9 percent right arm permanent impairment based on entrapment neuropathy and 14 percent left upper extremity permanent impairment based on entrapment neuropathy and left bicep motor strength deficit.

By decision dated March 7, 2016, the hearing representative affirmed the October 22, 2015 decision. He found that Dr. Meller had resolved a conflict in the medical evidence and represented the weight of the medical evidence.

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.[4] 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.[5] 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.[6]

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).[7] 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.[8]

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[4] *See* 20 C.F.R. §§ 1.1-1.4.

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

[6] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] *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).

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

The A.M.A., *Guides* notes that when impairment results strictly from a peripheral nerve lesion, no other rating method is applied to this section (15.4 Peripheral Nerve Impairments) to avoid duplication or unwarranted increase in the impairment estimation.[9]

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[10] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to a referee, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[11]

ANALYSIS

In an August 6, 2015 memorandum, OWCP found a conflict between Dr. Diamond and an OWCP medical adviser, Dr. Berman, with respect to upper extremity permanent impairment. The Board finds, however, that the medical evidence of record was not of sufficient probative value to create a conflict under 5 U.S.C. § 8123(a). As to Dr. Berman's December 17, 2014 report, the May 11, 2015 hearing representative had found the report was of diminished probative value. The case was remanded because the medical adviser had not addressed the issue of whether there was additional permanent impairment from other accepted conditions beyond carpal tunnel syndrome.

Dr. Diamond's April 14, 2014 report was also of diminished probative value. He referred to the left shoulder, the left elbow and left biceps, as well as right wrist degenerative disc disease. It is unclear how he determined that any impairment was casually related to an accepted employment injury. Moreover, it is unclear whether the A.M.A., *Guides* have been properly considered in this case. Dr. Diamond refers to both loss of ROM (left shoulder) and to DBI. The Board has held no consistent interpretation has been developed or followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes under FECA.[12] The Board has remanded cases to OWCP to establish a consistent method for rating upper extremity impairment,[13] and to further develop the claims as necessary.

The Board accordingly finds that the reports of Dr. Berman and Dr. Diamond to be of diminished probative value. When the medical reports are of diminished probative value there is no conflict under 5 U.S.C. § 8123(a).[14] The May 11, 1995 hearing representative decision did

[9] *Supra* note 7. A.M.A., *Guides* 423 (Note that peripheral nerve impairment may be combined with diagnosis-based impairment (DBI) at the upper extremity as long as the DBI does not encompass the nerve impairment. A.M.A., *Guides* 419).

[10] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[11] *William C. Bush*, 40 ECAB 1064 (1989).

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

[13] *See, e.g., O.S.*, Docket No. 15-1837 (issued February 23, 2017).

[14] *See Mary L. Henninger*, 52 ECAB 408 (2001); *O.G.*, Docket No. 16-1354 (issued January 3, 2017).

not find a conflict and did not remand the case for referral to a referee physician. Therefore, this referral to Dr. Meller was for a second opinion examination.[15]

Dr. Meller opined that appellant had six percent bilateral upper extremity permanent impairment based on entrapment neuropathy. He applied Table 15-23, using a grade modifier 2, or a default upper extremity impairment of five percent.[16] Dr. Meller added one percent based on a functional scale of severe. Dr. Diamond then submitted a February 23, 2016 report, opining that appellant had 9 percent right upper extremity and 14 percent left upper extremity permanent impairment. He no longer used a DBI or ROM approach, but limited his review to entrapment and peripheral neuropathy. Dr. Diamond applied Table 15-23 for both the right median nerve and right ulnar nerve. For the left upper extremity, the permanent impairment was based on Table 15-23 for the left median nerve, and peripheral neuropathy involving the left biceps under *The Guides Newsletter*.[17]

The Board finds that now a conflict under 5 U.S.C. § 8123(a) was created between Dr. Diamond and Dr. Meller. The case will be remanded for proper resolution of the conflict. OWCP should refer the case to an appropriate physician selected as a referee physician under established procedures. The referee should provide a reasoned medical opinion, based on a complete history including all accepted conditions, as to the permanent impairment to the upper extremities pursuant to the A.M.A., *Guides.* After such further development as is deemed necessary, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for further development.

[15] Even though the report of a physician is not entitled to the special weight afforded to the opinion of a referee, it can still be considered for its own intrinsic value. *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[16] A.M.A., *Guides* 449, Table 15-23.

[17] For spinal nerve impairments to the upper or lower extremities, OWCP procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied. *See G.N.*, Docket No. 10-850 (issued November 12, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2016 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 25, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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