United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 16-1817**
	)	**Issued: April 14, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Belleville, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 12, 2016 appellant filed a timely appeal from an August 18, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 established more than five percent permanent impairment of her right upper extremity, for which she has previously received a schedule award.

FACTUAL HISTORY

On February 21, 2014 appellant, then a 58-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury to her right shoulder as a result of slipping and falling on ice while loading mail into her vehicle. By decision dated June 5, 2014,

[1] 5 U.S.C. § 8101 *et seq.*

OWCP accepted the claim for scapulohumeral fibrositis/impingement of the right shoulder and a right rotator cuff tear.

Appellant sought treatment with Dr. Peter J. Anderson, a Board-certified orthopedic surgeon, and underwent an arthroscopic acromioplasty, open distal clavicle excision, and rotator cuff debridement and repair on October 10, 2014. Dr. Anderson noted that he minimally debrided the bursa as most of the rotator cuff was intact. On December 15, 2014 he released appellant to return to work with restrictions of sedentary work and no use of the right arm.

In a letter dated February 3, 2015, addressed to the employing establishment, Dr. Anderson noted that appellant had reached maximum medical improvement (MMI) from her conditions of a rotator cuff tear and acromioclavicular joint arthrosis. He noted that her final impairment rating was 20 percent.

On August 24, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated September 14, 2015, OWCP informed appellant of the evidence required to support her claim for a schedule award.

In a report dated October 19, 2015, Dr. Anderson noted that appellant had reached MMI and related that she had 15 percent permanent impairment of the upper extremity based on her rotator cuff surgery complicated by stiffness and pain.

By decision dated November 13, 2015, OWCP denied appellant's claim for a schedule award, noting that she failed to submit sufficient medical evidence to establish a permanent impairment. It noted that the report of Dr. Anderson dated October 19, 2015 failed to explain how he arrived at the figure of 15 percent with reference to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides* 2009).

On January 19, 2016 appellant requested reconsideration of OWCP's November 13, 2015 decision. With her request, she attached a letter from Dr. Anderson, dated December 15, 2015. Dr. Anderson wrote that he had rated appellant's impairment pursuant to the A.M.A., *Guides* sixth edition. He opined that she had 13 percent upper extremity impairment due to a class 1 injury for a rotator cuff repair with residual symptoms and some loss of motion. Dr. Anderson noted that appellant had some modifiers, including her loss of motion and residual functional loss. He related that he had rated her impairment pursuant to the A.M.A., *Guides* at page 405 for the upper extremity, 403 for the upper extremity, as well as page 417.

OWCP routed the case file, a statement of accepted facts, and medical reports of Dr. Anderson to a district medical adviser (DMA) on April 6, 2016. On May 8, 2016 the DMA rendered a report, finding that appellant's final right upper extremity impairment was five percent. The DMA explained that he rated her right upper extremity impairment using the diagnosis-based impairment (DBI) method as the physical examinations did not denote range of motion (ROM) measurements. He noted that both diagnoses for appellant's shoulder impairment yielded the same impairment rating, so he chose to rate the partial rotator cuff tear. The DMA then explained that partial rotator cuff tear with residual loss was a class 1 impairment. A default grade C corresponded to three percent impairment rating (Table 15-5, page 402). The Functional

History (GMFH) was grade modifier 1 for a mild problem (Table 15-7, page 406). The Physical Examination (GMPE) was a grade modifier 1 for a mild problem (Table 15-8). The Clinical Studies (GMCS) was a grade modifier 4 as it showed rotator cuff tear and biceps tendon pathology (Table 15-9, page 410). The net modifier was +3 (0+0+3). This moved the grade 2 spaces to the right to a grade E which corresponded to five percent permanent impairment of the right upper extremity.

The DMA further noted that he had reviewed Dr. Anderson's report and was unclear as to how he arrived at a rating of 13 percent for a rotator cuff tear, as the pages referenced by Dr. Anderson did not correspond to the evaluation of impairment for that condition. He observed that the date of MMI was February 3, 2015.

By decision dated May 16, 2016, OWCP concluded that the new evidence warranted modification of its November 13, 2015 decision. Consequently, it vacated its prior schedule award decision, and granted a schedule award of five percent permanent impairment of the right upper extremity. The date of MMI was noted as February 3, 2015. The award covered a period of 15.6 weeks from July 4 through October 21, 2015.

On August 2, 2016 appellant requested reconsideration of OWCP's May 16, 2016 decision. With her request, she attached notes from a physical therapist regarding a work conditioning reevaluation. Appellant also submitted a letter dated July 18, 2016 from Dr. Anderson, in which he noted that he agreed with the "evaluation regarding the percentage of job demands she is able to do, her ROM, and her pain level."

By decision dated August 18, 2016, OWCP reviewed the merits of appellant's case and denied modification of its prior decision of May 16, 2016. It noted that Dr. Anderson's letter of July 18, 2016 did not clarify how he arrived at his earlier impairment rating.

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.[2] 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.[3] 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.[4]

[2] *See* 20 C.F.R. §§ 1.1-1.4.

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

[4] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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).[5] 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.[6]

ANALYSIS

OWCP accepted appellant's claim for scapulohumeral fibrositis/impingement of the right shoulder and a right rotator cuff tear. The issue is whether appellant sustained more than five percent permanent impairment of the upper right extremity, for which she had previously received a schedule award. The Board finds that the 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.[7] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[8] 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.[9]

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

[5] *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 2.808.5(a) (February 2013).

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

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

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

[9] *Supra* note 7.

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 August 18, 2016 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 that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2016 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: April 14, 2017
Washington, DC

Christopher J. Godfrey, 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