

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

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S.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,  
Fairlawn, OH, Employer**

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**Docket No. 17-0087  
Issued: April 5, 2017**

*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:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 20, 2016 appellant, through counsel, filed a timely appeal from a September 14, 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 has established more than one percent permanent impairment of her right upper extremity, for which she previously received 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.*

## **FACTUAL HISTORY**

On December 17, 2013 appellant, then a 47-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 4, 2013, she sustained a neck injury when her vehicle was rear-ended at a traffic light by another vehicle. OWCP accepted her claim for neck sprain, back sprain of the thoracic region, and sprain of the right shoulder on January 27, 2014.

On January 23, 2015 appellant requested a schedule award (Form CA-7). On January 27, 2015 OWCP notified her that it had not received any medical evidence in support of her schedule award claim. It afforded appellant 30 days to submit additional evidence. Appellant did not respond within the time allotted.

By decision dated March 18, 2015, OWCP denied appellant's claim for a schedule award, finding that the medical evidence was not sufficient to establish permanent impairment to a scheduled member due to her accepted work injury.

On March 23, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. With the request, appellant submitted a report dated April 21, 2015 from Dr. Catherine Watkins Campbell, a Board-certified occupational medicine specialist. Dr. Watkins Campbell rendered an impairment rating of seven percent of the right shoulder based upon the Sixth Edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). She stated that appellant reached maximum medical improvement on December 16, 2014 and used the range of motion (ROM) method of impairment. Based on a *QuickDASH* score of 57, Dr. Watkins Campbell assigned a functional history modifier of grade 2 and for physical examination a grade modifier of 1. For each modifier, she referenced Table 15-7 and Table 15-9, respectively, within the A.M.A., *Guides* to justify her grade modifiers.

By decision dated September 10, 2015, an OWCP hearing representative vacated OWCP's March 18, 2015 decision, noting that due to the submission of the April 21, 2015 report of Dr. Watkins Campbell, appellant had submitted sufficient evidence to warrant review by a district medical adviser (DMA).

OWCP forwarded the case record and a statement of accepted facts to a DMA on September 21, 2015. On October 1, 2015 the DMA, Dr. Morley Slutsky, Board-certified in occupational medicine, rated appellant's permanent impairment of the right upper extremity impairment for right shoulder sprain as one percent impairment. He stated that his percentage of permanent impairment differed from Dr. Watkins Campbell's because he used the diagnosis-based impairment (DBI) rating method, while she used the ROM-based method of impairment rating.

By decision dated December 16, 2015, OWCP granted appellant a schedule award for one percent permanent impairment of right upper extremity. It noted that the weight of medical evidence regarding appellant's percentage of impairment was assigned to the DMA because he correctly applied the A.M.A., *Guides*.

On December 30, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on August 1, 2016. At the hearing, counsel alleged that Dr. Watkins Campbell's report was not fully and properly evaluated, and that Dr. Slutsky was biased and unfair, using stale evidence to lower appellant's impairment rating. Counsel argued that Dr. Slutsky's bias created an adversarial stance in a proceeding that was supposed to be nonadversarial.

On September 14, 2016 the hearing representative affirmed OWCP's December 16, 2015 decision, finding that Dr. Slutsky's opinion constituted 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 FECA program with the Director of OWCP.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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).<sup>6</sup> 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.<sup>7</sup>

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<sup>3</sup> See 20 C.F.R. §§ 1.1-1.4.

<sup>4</sup> For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

<sup>5</sup> 20 C.F.R. § 10.404. See also Ronald R. Kraynak, 53 ECAB 130 (2001).

<sup>6</sup> 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).

<sup>7</sup> Isidoro Rivera, 12 ECAB 348 (1961).

## **ANALYSIS**

The issue on appeal is whether appellant has more than one 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.

In her April 21, 2015 report, Dr. Watkins Campbell found that appellant had seven percent permanent impairment of her right shoulder using the ROM method. On October 1, 2015 Dr. Slutsky, acting as OWCP's DMA, reviewed Dr. Watkins Campbell's report and found that appellant had one percent permanent impairment of her right upper extremity, pursuant to the DBI protocol for rating permanent impairment.

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.<sup>8</sup> The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.<sup>9</sup> 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.<sup>10</sup>

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 September 14, 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.

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<sup>8</sup> *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

<sup>9</sup> *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

<sup>10</sup> *Supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 14, 2016 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 5, 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