United States Department of Labor
Employees' Compensation Appeals Board

M.V., Appellant	)	
and	)	**Docket No. 17-0129**
	)	**Issued: April 25, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Edison, NJ, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 27, 2016 appellant, through counsel, filed a timely appeal from a June 30, 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 12 percent permanent impairment of the right upper extremity, for which he 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 November 24, 2008 appellant, then a 57-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on the same, date he tripped over a manual pallet jack and fell on his right shoulder. OWCP accepted appellant's claim for closed dislocation of the right shoulder. It authorized arthroscopic surgery which was performed on June 29, 2009. Appellant stopped work on November 2, 2008 and voluntarily retired on September 30, 2013.

Appellant came under the treatment of Dr. Clifford Botwin, an osteopath, from December 1, 2008 to June 29, 2009, for a work-related right shoulder injury. Dr. Botwin diagnosed dislocated right shoulder, reduced. A March 15, 2009 magnetic resonance imaging (MRI) scan of the right shoulder revealed supraspinatus and infraspinatus tear, retraction of the supraspinatus tendon, atrophic changes of the supraspinatus muscle, infiltration of the infraspinatus muscle in association with atrophic changes, and an almost complete tear of the subscapularis tendinosis. On June 29, 2009 Dr. Botwin performed an authorized arthroscopic arthrotomy of the right shoulder with bursoscopy, bursectomy, acromioplasty, partial resection of distal clavicle with coplaning technique, and a partial debridement of the extensive torn rotator cuff. He diagnosed impingement syndrome of the right shoulder due to severe bursitis and prominent distal right clavicle and extensive irreparable tear of the right rotator cuff. Appellant underwent physical therapy from August 26 to October 28, 2009.

On May 15, 2015 appellant filed a claim for a schedule award (Form CA-7). He submitted a June 18, 2014 report from Dr. Nicholas Diamond, an osteopath, who noted a history of appellant's work condition and subsequent surgery. Dr. Diamond diagnosed post-traumatic right shoulder strain and sprain, right shoulder impingement syndrome, extensive rotator cuff tear, status post right shoulder arthroscopy with arthroscopic bursoscopy, bursectomy, acromioplasty, partial resection of distal clavicle with coplaning technique, partial debridement of the extensive torn rotator cuff, history of chronic cervical degenerative joint disease, and derivative left shoulder strain and sprain. Right shoulder examination revealed arthroscopic portal scars, acromioclavicular tenderness, anterior and posterior cuff tenderness, and positive Hawkin's impingement sign. Range of motion (ROM) of the right shoulder revealed forward elevation of 40 degrees with pain, abduction of 30 degrees with pain, cross-over adduction of 40 degrees with pain, external rotation of 90 degrees, and internal rotation of 60 degrees. Dr. Diamond noted the work-related injury of November 24, 2008 was the competent producing factor for the claimant's subjective and objective findings. He calculated appellant's impairment rating pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).[3] Utilizing the ROM method for rating permanent impairment in Table 15-34 of the A.M.A., *Guides*, flexion measured 40 degrees for 9 percent impairment, abduction measured 30 degrees for 6 percent impairment, and internal rotation measured 60 degrees for 2 percent impairment. Dr. Diamond opined that appellant sustained 18 percent permanent impairment of the right arm. He also noted left shoulder ranges of motion and found six percent permanent impairment of the left arm. Dr. Diamond noted that appellant reached maximum medical improvement (MMI) on June 18, 2014.

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

In a November 25, 2015 report, OWCP's medical adviser reviewed the medical record and noted that appellant's accepted conditions were closed dislocation of the right shoulder and sprain of the right shoulder. He reviewed the report of Dr. Diamond dated June 18, 2014 and noted appellant's June 29, 2009 surgery. The medical adviser noted that Dr. Diamond had mistakenly calculated 18 percent total impairment for the right upper extremity when it should have been 17 percent impairment using the ROM method. He noted that Dr. Diamond documented ROM deficits in the contralateral left shoulder of six percent pursuant to Table 15-34 of the A.M.A., *Guides*. The medical adviser indicated that pursuant to the A.M.A., *Guides*, page 461, "If the opposite extremity is neither involved nor previously injured, it must be used to define normal for that individual; any losses should be made in comparison to the opposite normal extremity." He noted that a review of the records provided no prior history of left shoulder injury. The medical adviser indicated that if the stand alone ROM method is utilized for determining impairment the 6 percent impairment for the left shoulder should be subtracted from the 17 percent impairment of the right shoulder, which yielded 11 percent right arm permanent impairment. He noted an alternative method for rating impairment, a diagnosis-based impairment (DBI), pursuant to Table 15-5 of the A.M.A., *Guides* for clavicle excision did not require normal motion. The medical adviser referenced the Shoulder Regional Grid, Table 15-5, p. 403, A/C joint injury or disease, status post distal clavicle resection was class 1, default value of 10 percent impairment. He noted a grade modifier for functional history of 2, a grade modifier for physical examination of 2, and a grade modifier for clinical studies of 2. Using the net adjustment formula, the medical adviser calculated a net adjustment of +2 which resulted in class 1 with an adjustment +2 from the default value C to E for 12 percent permanent impairment of the right upper extremity. He determined the date of MMI was June 18, 2014.

In a decision dated January 11, 2016, OWCP granted appellant a schedule award for 12 percent impairment of the right arm. The period of the award was from June 18, 2014 to March 7, 2015.

On January 18, 2016 appellant requested an oral hearing which was held on April 11, 2016. He submitted a corrected report from Dr. Diamond dated April 27, 2016 in which he noted flexion of 40 degrees was nine percent impairment, abduction of 30 degrees was six percent impairment, and internal rotation of 60 degrees was two percent impairment. Dr. Diamond opined that appellant had 17 percent permanent impairment of the right arm after a net adjustment of zero. He disagreed with OWCP's medical adviser and noted that it was not appropriate to deduct the left shoulder impairment rating from the right shoulder rating according to the A.M.A., *Guides* as the right shoulder impairment was rated separately.

In a decision dated June 30, 2016, an OWCP hearing representative affirmed OWCP's January 11, 2016 decision.

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

[4] *See* 20 C.F.R. §§ 1.1-1.4.

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]

ANALYSIS

The issue on appeal is whether appellant has more than 12 percent permanent impairment of the right upper extremity for which he 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.[9] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[10] In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed

[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).

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

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

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 methodologies. 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.[11]

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 June 30, 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 this case not in posture for decision.

[11] *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 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 25, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board