United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 16-1630**
	)	**Issued: August 2, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Southfield, MI, Employer	)	

Appearances:
Alan J. Shapiro, *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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 10, 2016 appellant, through counsel, filed a timely appeal from a June 1, 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 met her burden of proof to establish greater than five percent permanent impairment of the right 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 April 17, 2003 appellant, then a 48-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging a right shoulder condition that she attributed to right arm "repetitive motion" while performing her employment duties. OWCP accepted the claim for right rotator cuff syndrome and right shoulder tenosynovitis, which arose on or about October 1, 2001. After undergoing right shoulder arthroscopic surgery in January 2003, appellant returned to work in a limited-duty capacity on April 28, 2003.[3] She resumed her regular letter carrier duties in October 2003.

On December 10, 2013 appellant filed a claim for a schedule award (Form CA-7).

OWCP received a July 11, 2013 note from Dr. M. David Jackson, a Board-certified physiatrist, who advised that appellant had reached maximum medical improvement (MMI) regarding her right shoulder.

By letter dated December 17, 2013, OWCP advised appellant that she needed to have her physician submit a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (hereinafter A.M.A., *Guides*). It afforded her at least 30 days to submit the requested medical evidence. However, it did not receive the requested evidence within the allotted timeframe.

By decision dated March 17, 2014, OWCP denied appellant's claim for a schedule award.

On March 21, 2014 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He also submitted an April 15, 2014 report from Dr. John L. Dunne, an occupational medicine specialist, who found that appellant had 17 percent permanent impairment of the right upper extremity under the A.M.A., *Guides* (6th ed. 2009). Dr. Dunne rated appellant for loss of shoulder range of motion (ROM). He found that the right shoulder examination noted subtle loss of mass in the supraspinatus fossa compared to the left and was held slightly protracted at rest. After a brief warm-up, the range of motion of the right shoulder was assessed *via* standard goniometer technique over three trials averaged to provide the following measurements: flexion 105 degrees; extension 20 degrees; abduction 80 degrees; adduction 45 degrees; external rotation 50 degrees; and internal rotation 30 degrees with the elbow held at approximately 60 degrees of abduction for comfort. Functional testing noted grade 4 weakness of resisted abduction in the plane of the supraspinatus on anterior flexion. There was a markedly positive Neer's and Hawkins' maneuver for continued impingement. Speed's and Yergason's testing were normal. The biceps and triceps strength was normal with the elbow held at the side. Grip and pinch were normal. Sensory and vascular examinations were normal to the right upper extremity. Capillary refill was normal and there was no atrophy of the hand. Dr. Dunne indicated that there were no other findings upon examination relative to the allowed conditions of the claim. He concluded that appellant had reached MMI for her accepted employment-related conditions by mid-2003, when she returned to work.

[3] On January 3, 2003 appellant underwent right shoulder arthroscopy with subacromial decompression, which OWCP retroactively authorized. Additionally, OWCP paid wage-loss compensation for the period December 31, 2002 through April 24, 2003.

Dr. Dunne indicated that appellant's most impairing diagnosis was impingement syndrome under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2009). However, he explained that "available impairment under the shoulder regional grid of impingement syndrome [did] not apply as the only available assessment there [was] for residual loss of function [was] with normal motion," and the impingement syndrome class was asterisked (*) to allow for impairment to be assessed by the ROM method. Dr. Dunne determined that under Table 15-34, Shoulder Range of Motion, A.M.A., *Guides* 475 (6th ed. 2009), appellant had 3 percent permanent impairment for flexion, 2 percent permanent impairment for extension, 6 percent permanent impairment for abduction, 0 percent permanent impairment for adduction, 2 percent permanent impairment for external rotation, and 4 percent permanent impairment for internal rotation, which totaled 17 percent permanent impairment of the right upper extremity due to loss of shoulder range of motion. He opined that no adjustment was to be made for functional history and concluded that appellant had 17 percent permanent impairment of the right upper extremity.

By decision dated September 11, 2014, the hearing representative vacated the March 17, 2014 decision, and remanded the case so that OWCP could refer the latest medical evidence of impairment to its district medical adviser (DMA) for review.

After obtaining a copy of appellant's January 3, 2003 right shoulder operative report, OWCP referred the case to its DMA, Dr. Morley Slutsky, who is Board-certified in occupational medicine.

In a March 11, 2015 report, Dr. Slutsky explained that he rated appellant's impairment using the preferred diagnosis-based impairment (DBI) method, whereas Dr. Dunne used the ROM method. The DMA rated appellant based on right shoulder impingement syndrome, which was a Class of diagnosis 1 (CDX 1) with a default rating (grade C) of 3 percent under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2009). Dr. Slutsky assigned a grade modifier of 2 for Functional History (GMFH) based on appellant's *Quick*DASH score of 52. He assigned a grade modifier of 2 for Physical Examination (GMPE) based on appellant's range of motion limitations. Lastly, Dr. Slutsky assigned a grade modifier of 1 for Clinical Studies (GMCS) based on a March 14, 2002 right shoulder magnetic resonance imaging (MRI) scan. He calculated a net adjustment of +2, and found 5 percent (grade E) right upper extremity permanent impairment under Table 15-5, A.M.A., *Guides* 402 (6th ed. 2009).[4] Dr. Slutsky indicated that appellant reached MMI as of April 15, 2014.

In a March 26, 2015 report, Dr. Dunne noted that he reviewed the DMA's March 11, 2015 report. He explained that if the ROM impairment methodology was unacceptable, he would alternatively rate appellant under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 403 (6th ed. 2009) based on a diagnosis of acromioclavicular (AC) joint injury or disease, status post distal clavicle resection. Dr. Dunne was of the opinion that appellant's January 3, 2003 right shoulder arthroscopy included a distal clavicle resection.[5] He explained that the CDX for

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

[5] However, the January 3, 2003 operative report specifically noted in relevant part: "Inferior shaving of the clavicle was carried out but the distal clavicle was not resected."

AC joint injury/disease, status post distal clavicle resection represented 10 percent (grade C) upper extremity impairment, in contrast to the DMA's lower rating for impingement syndrome. Dr. Dunne concurred with the DMA's net adjustment calculation of +2 and, therefore, found a final right upper extremity impairment of 12 percent (grade D) under A.M.A., *Guides* 403, Table 15-5, (6th ed. 2009).

On April 13, 2015 Dr. Slutsky reviewed Dr. Dunne's March 26, 2015 report and explained that the rating for status post distal clavicle resection was in error. The DMA specifically noted that the January 3, 2003 operative report indicated that appellant's "'distal clavicle was not resected.'" Dr. Slutsky, therefore, reiterated his prior 5 percent DBI rating for right shoulder impingement, which was the "preferred" methodology over Dr. Dunne's previous ROM-based 17 percent permanent impairment rating.

By decision dated June 19, 2015, OWCP granted appellant a schedule award for five percent permanent impairment to the right upper extremity. The award covered a 15.6-week period from April 15 to August 2, 2014.

Counsel timely requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 21, 2016. He challenged OWCP's reliance on Dr. Slutsky's report(s), and specifically his opinion regarding usage of the ROM-based impairment methodology. OWCP did not receive any additional medical evidence regarding the extent of appellant's right upper extremity permanent impairment.

In a decision dated June 1, 2016, the hearing representative accepted the DMA's opinion and found that appellant had not established that she had greater than five percent permanent impairment of the right upper extremity. Consequently, the hearing representative affirmed OWCP's June 19, 2015 schedule award.

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]

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[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).

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).[9] The Board has approved OWCP's use 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 met her burden of proof to establish that she has greater than five percent right upper extremity permanent impairment, 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 had been followed regarding the proper use of the diagnosis-based impairment (DBI) or the range of motion (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 were 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 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 found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[13]

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the June 1 2016 decision. Utilizing a

[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.

consistent method for calculating permanent impairment for upper extremities applied uniformly, and after 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.

ORDER

IT IS HEREBY ORDERED THAT the June 1, 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: August 2, 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