United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 16-1680**
	)	**Issued: August 10, 2017**
U.S. POSTAL SERVICE, MID-ISLAND PROCESSING & DISTRIBUTION CENTER, Melville, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 15, 2016 appellant, through counsel, filed a timely appeal from a July 21, 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.[3]

[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.*

[3] The record provided to the Board includes evidence that OWCP received after having issued its July 21, 2016 decision. The Board's jurisdiction, however, is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, it has no jurisdiction to review this evidence. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met his burden of proof to establish more than 10 percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On May 13, 2005 appellant, then a 59-year-old tractor-trailer operator, injured his right shoulder while shutting the door on a trailer. OWCP accepted his traumatic injury claim (Form CA-1) for right upper arm/shoulder sprain. Between September 2005 and November 2013, appellant underwent multiple OWCP-authorized right shoulder surgical procedures.[4] OWCP paid compensation for temporary total disability for various periods of wage loss associated with appellant's approved surgeries. Appellant last worked on August 28, 2012.[5]

On June 26, 2015 appellant filed a claim (Form CA-7) for a schedule award.

In a February 3, 2015 report, Dr. Stephen A. Kottmeier, a Board-certified orthopedic surgeon, found that appellant reached maximum medical improvement (MMI) as of January 8, 2015 and that he had a 1 to 13 percent right upper extremity permanent impairment due to his biceps condition.[6] He referenced Table 15.5, Shoulder Regional Grid, American Medical Association, *Guides to the Evaluation of Permanent Impairment* 404 (6th ed. 2009) (A.M.A., *Guides*).[7]

OWCP referred the case record to its district medical adviser (DMA) and, in a May 25, 2016 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, found that appellant had 10 percent permanent impairment of the right upper extremity. Dr. Harris concurred with Dr. Kottmeier's finding that appellant reached MMI as of January 8, 2015. His 10 percent combined upper extremity rating included 5 percent permanent impairment for residuals due to multiple right shoulder surgeries, including bicipital tenodesis.[8] Dr. Harris also found five

[4] Appellant's right shoulder surgeries included a September 30, 2005 arthroscopic subacromial decompression and biceps tenodesis, an April 20, 2006 repeat subacromial decompression with bursal resection and open extraction of bio-tenodesis hardware, a March 9, 2007 diagnostic arthroscopy, and a June 30, 2008 arthroscopic subacromial decompression and open revision of subpectoral bicipital tenodesis. He also underwent right shoulder neuroma/scar tissue excisions on April 12 and November 29, 2013.

[5] On August 28, 2012 appellant underwent OWCP-approved ultrasound cryoblation of right subclavicular nerve. OWCP accepted a recurrence of disability, effective August 28, 2012, and appellant has not since returned to work. Effective April 6, 2013, it placed him on the periodic compensation rolls.

[6] Dr. Kottmeir performed several of appellant's right shoulder surgical procedures.

[7] Dr. Kottmeier also noted that appellant had a grade modifier of two (2) for functional history (GMFH) and a *Quick*DASH score of 60 percent.

[8] A.M.A., *Guides* 404 (6th ed. 2009), Table 15-5.

percent permanent impairment for residual problems with neuropraxia of the right supraclavicular nerve.[9]

By decision dated July 21, 2016, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity. The award covered a 31.2-week period from June 27, 2016 to January 31, 2017.

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.[10] The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[11] 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.[12] 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.[13]

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).[14] 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.[15]

[9] *Id*. at 436, Table 15-21, Peripheral Nerve Impairment.

[10] 5 U.S.C. § 8149.

[11] *See* 20 C.F.R. §§ 1.1-1.4.

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

[13] 20 C.F.R. § 10.404; *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[14] *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).

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

ANALYSIS

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.[16] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[17] 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 DMAs use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either the ROM or DBI methodology. Because OWCP's own physicians were 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.[18]

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 July 21, 2016 decision. Utilizing a 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 that this case is not in posture for decision.

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

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

[18] *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 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 10, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy 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