

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

B.C., Appellant

and

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

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**Docket No. 17-0173
Issued: August 11, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 3, 2016 appellant, through counsel, filed a timely appeal from a September 22, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 sustained more than one 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 November 28, 2012 appellant, then a 52-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 27, 2012 she sustained a right wrist sprain and tenosynovitis of the right wrist as a result of lifting a tray of mail. She stopped work on November 28, 2012 and received wage-loss compensation.

By decision dated February 26, 2013, OWCP accepted the claim for right wrist strain, right wrist derangement, and tenosynovitis of the right wrist.

On November 31, 2013 appellant underwent release of the first extensor compartment with synovectomy of the first and second extensor tendons. On July 25, 2014 she was released to work in an unrestricted duty capacity.

In an October 21, 2014 note, Dr. William A. Seeds, a Board-certified orthopedic surgeon, reported that appellant had reached maximum medical improvement (MMI).

On November 7, 2014 appellant filed a claim for a schedule award (Form CA-7).

By letter dated November 21, 2014, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).³ It afforded appellant 30 days to submit the requested impairment evaluation. No further evidence was received.

By decision dated April 1, 2015, OWCP denied appellant's claim for a schedule award finding that the evidence of record was insufficient to establish any permanent impairment to a member or function of the body.

By letter dated April 6, 2015, appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In support of her claim, appellant submitted a March 12, 2015 impairment evaluation from Dr. Catherine Watkins Campbell, Board-certified in occupational medicine and family medicine. Dr. Watkins Campbell noted review of appellant's medical history, discussed diagnostic studies, and provided findings on physical examination. She opined that appellant reached MMI on October 21, 2014. Dr. Watkins Campbell noted that the allowed conditions involved the diagnosis of de Quervain's disease and injury at the wrist joint. She explained that she would use the stand alone range of motion (ROM) method due to decreased ROM present in the wrist joint. Dr. Watkins Campbell determined that appellant's wrist impairment was placed her in class one of the rating grid. She assigned functional history grade modifier of one based on a *QuickDASH* score of 23 and physical examination a grade modifier of two based on the degree of observed atrophy. Dr. Watkins Campbell concluded that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant sustained eight percent permanent impairment of the right upper extremity.

³ A.M.A., *Guides* (2009).

By decision of September 22, 2015, an OWCP hearing representative set aside the April 1, 2015 decision and remanded the case for further medical development to determine whether appellant sustained a permanent impairment of the right upper extremity.

On remand OWCP routed Dr. Watkins Campbell's report, a statement of accepted facts (SOAF), and the case file to Dr. Morley Slutsky, Board-certified in occupational medicine serving as an OWCP district medical adviser (DMA).

In an October 9, 2015 report, Dr. Slutsky opined that Dr. Watkins Campbell improperly determined appellant's permanent impairment of the right upper extremity by use of the ROM rating methodology as appellant's permanent impairment rating could be determined by the preferred diagnosis-based impairment (DBI) methodology. He determined that the accepted sprain represented the most impairing diagnosis as appellant had undergone surgery related to accepted tenosynovitis. Dr. Slutsky explained that appellant had consistently been found to have normal right ROM prior to Dr. Watkins Campbell's findings.⁴ He reported that he would utilize the DBI method over the ROM method and appellant would be rated for a sprain after having undergone release for de Quervain's tenosynovitis. Dr. Slutsky further reported that he used ROM for the physical examination grade modifier per the A.M.A., *Guides* criteria. Citing Table 15-3 Wrist Regional Grid of the A.M.A., *Guides*, he determined a default class one, grade C impairment referable to accepted wrist sprain.⁵ Dr. Slutsky identified grade modifiers of one for functional history (symptomatic wrist), one for physical examination ROM loss, and zero for clinical studies. Utilizing the net adjustment formula, he explained that the grade modifiers resulted in an overall negative one modifier, which moved the impairment rating one grade to the left of grade C to grade B, for a one percent permanent impairment of the right upper extremity.⁶ Dr. Slutsky noted the date of MMI as November 25, 2014, the date of Dr. Watkins Campbell's examination.

By letter dated October 21, 2015, OWCP provided Dr. Watkins Campbell a copy of Dr. Slutsky's October 9, 2015 report for review and requested that she respond to the concerns presented by the DMA within 30 days. By letter dated November 13, 2015, counsel reported that at the present time Dr. Watkins Campbell was unable to provide any additional information regarding appellant's permanent impairment of the right upper extremity. No further evidence was received.

By decision dated December 14, 2015, OWCP granted appellant a schedule award for one percent permanent impairment of the right upper extremity. The date of MMI was noted as November 25, 2014. The award covered a period of 3.12 weeks from November 25 through December 16, 2014.

By letter dated December 24, 2015, appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

⁴ Dr. Slutsky noted that, while Dr. Watkins Campbell found thenar atrophy present, yet no such finding was noted in 2014. As such, Dr. Slutsky concluded that findings of atrophy were not consistent.

⁵ *Supra* note 3 at page 395.

⁶ *Id.* at 411.

At the August 10, 2016 hearing, counsel argued that the A.M.A., *Guides* provide for rating impairment based on ROM loss if such a rating was more favorable to the appellant. He further asserted that Dr. Slutsky erred by comparing findings reported by Dr. Watkins Campbell to those reported by a prior physician. The record was held open for 30 days. No further evidence was received.

By decision dated September 22, 2016, an OWCP hearing representative denied modification of the December 14, 2015 decision, finding that appellant had no more than one percent permanent impairment of the right upper extremity, for which she had previously received a schedule award. It found that the weight of the medical evidence rested with Dr. Slutsky who provided an impairment rating consistent with the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

Section 8149 of FECA⁷ 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.⁸ 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.⁹ 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.¹⁰

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).¹¹ The Board has approved the use by OWCP of the A.M.A.,

⁷ 5 U.S.C. § 8149.

⁸ See 20 C.F.R. §§ 1.1-1.4.

⁹ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

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

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹²

ANALYSIS

OWCP accepted appellant's claim for right wrist strain, right wrist derangement, and tenosynovitis of the right wrist. The issue is whether appellant sustained more than one percent permanent impairment of the right upper extremity for which she previously received a schedule award. The Board finds this case is not in posture for decision.

In support of her claim, appellant submitted a March 12, 2015 impairment evaluation from Dr. Watkins Campbell who opined that she sustained eight percent impairment to the right upper extremity. Dr. Watkins Campbell utilized the stand alone ROM method to calculate appellant's impairment rating due to decreased ROM present in the wrist joint.

Dr. Slutsky, serving as OWCP's DMA, disagreed with Dr. Watkins Campbell's impairment rating finding that she should have used the preferred DBI methodology and utilized ROM for the grade adjustment. He determined that the accepted sprain represented the most impairing diagnosis as appellant had undergone surgery related to accepted tenosynovitis. Assigning values for functional history, clinical studies, and physical examination, Dr. Slutsky determined that appellant sustained one percent permanent impairment of the right upper extremity.¹³

In its September 22, 2016 decision, OWCP explained that Dr. Slutsky correctly determined appellant's impairment rating based on DBI, where ROM loss was applied as a grade adjustment. It noted that Dr. Watkins Campbell based the use of the ROM rating method solely on the existence of loss of motion and failed to explain why no other rating method, such as the DBI method, was applicable.

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 ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹⁴ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁵ In *T.H.*, the Board concluded that OWCP's 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 DMA use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either DBI or ROM

¹² *Isidoro Rivera*, 12 ECAB 348 (1961).

¹³ *Supra* note 5.

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

¹⁵ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

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.¹⁶

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 September 22, 2016 decision. Utilizing 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 a decision.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: August 11, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ *Supra* note 14.