

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

B.B., Appellant

and

**U.S. POSTAL SERVICE, AIRPORT MAIL
CENTER, Cleveland, OH, Employer**

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**Docket No. 17-0228
Issued: August 7, 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 9, 2016 appellant, through counsel, filed a timely appeal from a September 15, 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.

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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish more than two percent permanent impairment of her left upper extremity and more than one percent permanent impairment of her right upper extremity, for which she previously received schedule awards.

FACTUAL HISTORY

On September 7, 2004 appellant, then a 60-year-old sales and services associate, filed an occupational disease claim (Form CA-2) alleging that she had work-related muscle spasms in her neck, arms, shoulder, middle and lower back, and both legs and hips, which arose on or about July 1, 2004.³ She had previously sustained a work-related neck and lower back injury on April 14, 1984, which OWCP accepted for cervical and lumbar strains (OWCP File No. xxxxxx838).

In a January 7, 2005 decision, OWCP denied appellant's occupational disease claim because the medical evidence of record did not establish a causal relationship between appellant's accepted employment exposure and her diagnosed cervical, lumbar, and bilateral shoulder sprains.

On January 17, 2005 appellant, through counsel, requested an oral hearing before a hearing representative of OWCP's Branch of Hearings and Review. The hearing was held on March 22, 2005.

Appellant submitted a May 19, 2005 report from Dr. Edward H. Gabelman, Board-certified in orthopedic surgery, who diagnosed cervical and lumbar sprains, and bilateral shoulder girdle sprain. Dr. Gabelman opined that these conditions were caused by an April 14, 2004 work injury and were aggravated by appellant's work duties over time.

In a June 5, 2006 decision, an OWCP hearing representative set aside OWCP's January 7, 2005 decision based on Dr. Gabelman's report.

On June 9, 2006 OWCP accepted appellant's occupational disease claim for aggravation of cervical and lumbar sprains, and bilateral shoulder and upper arm sprain.⁴

On October 6, 2010 appellant filed a claim for a schedule award (Form CA-7). However, she did not submit any medical evidence in support of her claim for employment-related permanent impairment. On October 7, 2010 OWCP advised her of the deficiencies with respect

³ Appellant initially filed the current occupational disease claim as a recurrence of her April 14, 1984 traumatic injury (Form CA-1). On August 3, 2004 she filed a claim for recurrence of disability beginning July 1, 2004, which OWCP denied by decision dated November 9, 2004 under OWCP File No. xxxxxx838. At the time, OWCP advised appellant that based on her description of the duties she performed on July 1, 2004 appellant should have filed a new claim, rather than a claim for recurrence. In a September 28, 2005 decision, OWCP's Branch of Hearings and Review affirmed the November 9, 2004 decision.

⁴ OWCP administratively combined the current occupational disease claim with appellant's April 14, 1984 traumatic injury claim, and designated OWCP File No. xxxxxx838 as the master file.

to her claim for a schedule award, and afforded appellant at least 30 days to submit medical evidence of permanent impairment. Appellant did not respond within the time allotted.

By decision dated November 9, 2010, OWCP denied appellant's claim for a schedule award, finding that she had not established permanent impairment causally related to her accepted conditions.

On November 16, 2010 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review.

In a November 12, 2010 report, Dr. William N. Grant, a Board-certified internist, diagnosed bilateral carpal tunnel syndrome (CTS) and found that appellant had 25 percent bilateral upper extremity permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (hereinafter A.M.A., *Guides*). He rated appellant based on a combination of impairments due to entrapment/compression neuropathy (9 percent) and loss of wrist range of motion (18 percent).⁵

By decision dated February 10, 2011, the hearing representative set aside the November 9, 2010 decision. She remanded the case to OWCP with instructions to refer Dr. Grant's November 12, 2010 report to the district medical adviser (DMA) for review.

On March 3, 2011 the DMA reviewed the case, including Dr. Grant's November 12, 2010 report, and was unable to determine the extent of any employment-related permanent impairment. He noted, among other things, that OWCP had not accepted bilateral CTS and, it was unclear how Dr. Grant had arrived at this diagnosis. The DMA recommended that OWCP refer appellant to a physician to obtain an accurate and reliable permanent impairment rating.

OWCP subsequently referred appellant to Dr. Manhal A. Ghanma, for a second opinion examination and impairment rating. Dr. Ghanma examined appellant on June 13, 2011 and, in a July 20, 2011 report, he found 18 percent permanent impairment of the right upper extremity and 17 percent permanent impairment of the left upper extremity. He derived this rating by finding six percent bilateral upper extremity impairment for carpal tunnel syndrome under Table 15-23, A.M.A., *Guides* 449 (6th ed. 2009). Dr. Ghanma found additional upper extremity impairment due to loss of shoulder range of motion (ROM) under Table 15-34, A.M.A., *Guides* 475 (6th ed. 2009). On the right side he found 13 percent permanent impairment for shoulder ROM deficits, and on the left side he found 12 percent. The combined right and left upper extremity permanent impairments were 18 percent and 17 percent, respectively.

On June 11, 2014 the DMA, Dr. Morley Slutsky, a Board-certified occupational specialist, reviewed the claim and found that appellant had no permanent impairment of the upper extremities under the A.M.A., *Guides*. He took issue with Dr. Ghanma's bilateral shoulder ROM impairment, and instead relied on the "preferred" diagnosis-based impairment (DBI)

⁵ See Table 15-23, Entrapment/Compression Neuropathy Impairment, and Table 15-32, Wrist Range of Motion (ROM), A.M.A., *Guides* 449, 473 (6th ed. 2009).

methodology.⁶ Dr. Slutsky's zero percent bilateral upper extremity impairment rating was based on appellant's accepted bilateral shoulder sprain, which he found did not provide any basis for ratable impairment under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2009).⁷ He found one percent bilateral lower extremity impairment due to sensory deficits at the S1 nerve level. For this rating, Dr. Slutsky applied Proposed Table 2, *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). He explained that appellant's bilateral lower extremity permanent impairment was unrelated to the accepted lumbar strain, but instead was a function of her degenerative disc disease with stenosis at L5-S1.

By decision dated November 24, 2014, OWCP granted a schedule award for one percent permanent impairment of the right and left lower extremities. The award ran for 5.76 weeks, covering the period January 31 to March 12, 2013. OWCP also found that appellant had zero permanent impairment of the right and left upper extremities.

On December 18, 2014 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on July 16, 2015.

In a January 21, 2015 report, Dr. Catherine Watkins Campbell, a Board-certified family practitioner, found two percent bilateral upper extremity permanent impairment due to loss of shoulder ROM under Table 15-34, A.M.A., *Guides* 475 (6th ed. 2009).

At the July 16, 2015 hearing, counsel informed the hearing representative that he was submitting new medical evidence; *i.e.*, Dr. Watkins Campbell's January 21, 2015 impairment rating. The hearing representative issued a decision on September 3, 2015 setting aside the November 24, 2014 decision based on the submission of this new evidence. She remanded the case to OWCP for referral to its DMA, who was directed to review Dr. Watkins Campbell's January 21, 2015 report and determine whether appellant had any impairment of the upper extremities as a result of her bilateral shoulder condition.

On October 10, 2015 Dr. Slutsky reviewed Dr. Campbell's January 21, 2015 report, and found that appellant had two percent right upper extremity permanent impairment, but only one percent left upper extremity permanent impairment under the A.M.A., *Guides* (6th ed. 2009). He again took issue with the bilateral shoulder ROM impairment, and instead relied on the "preferred" DBI methodology. Dr. Slutsky's two percent right upper extremity permanent impairment and one percent left upper extremity permanent impairment were based on residuals

⁶ Dr. Slutsky did not address whether appellant had any ratable permanent impairment from bilateral carpal tunnel syndrome. Additionally, he found no upper extremity sensory/motor deficits due to appellant's accepted cervical strain.

⁷ At page 5 of his June 11, 2014 report, Dr. Slutsky quoted language from Section 15.2, page 387 regarding ROM usage. However, the quoted passage is not entirely consistent with the language contained in the latest version of the A.M.A., *Guides* (6th ed., 2009).

of right and left shoulder sprains under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2009).⁸

By decision dated December 16, 2015, OWCP granted appellant a schedule award for two percent right upper extremity permanent impairment and one percent left upper extremity permanent impairment. The award covered a period of 9.36 weeks, from October 15 through December 19, 2015. OWCP based the award on the DMA's October 10, 2015 impairment rating, which presented a different method for rating impairment than Dr. Watkins Campbell's ROM impairment rating.

By letter dated December 24, 2015 appellant, through counsel, requested an oral hearing with OWCP's Branch of Hearings and Review, which was held on August 3, 2016.

By decision dated September 15, 2016, the hearing representative affirmed the December 16, 2015 schedule award 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.⁹ 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.¹⁰ 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.¹¹

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.

⁸ At page 3 of his October 10, 2015 report, Dr. Slutsky again quoted language from Section 15.2, page 387 regarding ROM usage. As noted above, the quoted passage is not entirely consistent with the language contained in the latest version of the A.M.A., *Guides* (6th ed., 2nd prtng. 2009).

⁹ See 20 C.F.R. §§ 1.1-1.4.

¹⁰ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹² 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.¹³

ANALYSIS

The issue on appeal is whether appellant met her burden of proof to establish more than two percent permanent impairment of her left upper extremity and more than one percent permanent impairment of her right upper extremity, for which she previously received schedule awards. 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.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 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 cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology.¹⁶ 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.¹⁷

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 15, 2016 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities to be 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.

¹² 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).

¹³ *Isidoro Rivera*, 12 ECAB 348 (1961).

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

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

¹⁶ See *supra* notes 8 and 10.

¹⁷ *T.H.*, *supra* note 14.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 15, 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 7, 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