United States Department of Labor
Employees' Compensation Appeals Board

W.G., Appellant	)	
and	)	**Docket No. 17-1576**
	)	**Issued: December 8, 2017**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Newark, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 13, 2017 appellant, through counsel, filed a timely appeal from a February 10, 2017 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 three percent permanent impairment of his 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

This case has previously been before the Board.[3] The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On December 16, 2010 appellant, then a 59-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging a right shoulder condition as a result of repetitive employment duties. He noted on the claim form that he had not stopped work. OWCP accepted the claim for right rotator cuff tear. Appellant received compensation benefits on the supplemental rolls as of January 4, 2011 and on the periodic rolls from April 10 through December 17, 2011. OWCP authorized rotator cuff repair surgery, which was performed on June 29, 2011 by Dr. Zafer Termanini, a Board-certified orthopedic surgeon.[4]

On June 15, 2015 appellant filed a claim for compensation (Form CA-7) requesting a schedule award. With his claim, he submitted an April 23, 2015 report from Dr. David Weiss, an osteopath Board-certified in orthopedic surgery. Dr. Weiss examined appellant and noted that he had reached maximum medical improvement (MMI) on February 9, 2015. He diagnosed a partial thickness rotator cuff tear of the right shoulder, aggravation of a preexistent quiescent acromioclavicular arthropathy of the right shoulder, subacromial impingement syndrome of the right shoulder, a status post arthroscopy and arthrotomy of the right shoulder with rotator cuff repair and subacromial decompression, recurrent sprain and strain of the right shoulder, and moderately-severe progressive acromioclavicular arthropathy of the right shoulder. Dr. Weiss rendered an impairment rating pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] using the range of motion (ROM) method. Noting flexion of 130 degrees, abduction of 150 degrees, and international rotation of 70 degrees, he calculated that appellant's right upper extremity permanent impairment rating after net adjustment was nine percent.

On September 23, 2015 OWCP referred the case to a district medical adviser (DMA). The DMA was asked to review the medical evidence and provide a calculation of appellant's percentage of permanent loss of use of the right upper extremity, along with a date of MMI, in accordance with the sixth edition of the A.M.A., *Guides*.

In a report dated October 9, 2015, Dr. Henry Magliato, a Board-certified orthopedic surgeon and DMA, reviewed the report of Dr. Weiss and found that appellant had 16 percent

[3] Docket No. 13-0205 (issued March 5, 2013).

[4] On December 15, 2011 appellant submitted a notice of recurrence of total disability (Form CA-2a) as of November 20, 2011, alleging that the employing establishment was unable to provide him with work within his restrictions. By decision dated January 24, 2012, OWCP denied appellant's recurrence claim. By decision dated July 6, 2012, it denied modification of its January 24, 2012 decision. By letter dated October 25, 2012, appellant filed a timely appeal to the Board from the July 6, 2012 decision of OWCP. By decision dated March 5, 2013, the Board affirmed the July 6, 2012 decision of OWCP. The Board found that appellant had not submitted sufficient medical evidence to establish a recurrence of disability. Docket No. 13-0205 (issued March 5, 2013).

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

permanent impairment of his right upper extremity. He arrived at this figure by using the ROM method, noting that appellant's partial impairment was eight percent based on the ROM, to which he added seven percent due to appellant's *Quick*DASH score.

On November 4, 2015 OWCP requested that Dr. Magliato review his report, as it appeared that the figures were inaccurate. No response was received, and on May 16, 2016, OWCP forwarded the case file to another DMA for evaluation.

In a report dated May 25, 2016, Dr. Morley Slutsky, Board-certified in occupational medicine and a DMA, reviewed the report of Dr. Weiss and found that appellant had three percent permanent impairment of his right upper extremity. He noted that the diagnosis-based impairment (DBI) method of calculating impairment was preferred over the ROM method used by Dr. Weiss, and that the date of MMI was February 9, 2015. Noting a diagnosis class of 1, an unreliable functional history, a physical examination modification of 1, and no modification due to clinical studies, Dr. Slutsky determined that appellant had a final grade of C, which corresponded to a right upper extremity permanent impairment of three percent.

By decision dated August 2, 2016, OWCP found that appellant had three percent permanent impairment of the right upper extremity. It relied on Dr. Slutsky's calculations of appellant's percentage of impairment, noting that Dr. Weiss had incorrectly applied the A.M.A., *Guides*.

On August 10, 2016 appellant, through counsel, requested a hearing before an OWCP hearing representative. On November 22, 2016 counsel requested that the hearing be changed to a review of the written record.

By decision dated February 10, 2017, the hearing representative affirmed OWCP's August 2, 2016 decision. She noted that appellant had not submitted sufficient medical evidence establishing greater impairment.

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

[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).

regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[8]

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 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.[10]

ANALYSIS

The issue on appeal is whether appellant has more than three percent permanent impairment of the right upper extremity.

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 DBI or the 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 cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the

[8] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[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).

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 February 10, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities 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.[14]

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: December 8, 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

[13] *Supra* note 10.

[14] *See* FECA Bulletin No. 17-06 (issued May 8, 2017).