United States Department of Labor
Employees' Compensation Appeals Board

P.R., Appellant	)	
and	)	**Docket No. 14-1211**
	)	**Issued: February 22, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Detroit, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2014 appellant, through counsel, filed a timely appeal from an April 4, 2014 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 the decision.

[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 established more than three percent permanent impairment of the left upper extremity, for which she received a schedule award.

On appeal, counsel contends that OWCP's April 4, 2014 decision is "contrary to law and fact."

FACTUAL HISTORY

OWCP accepted that on July 20, 2010 appellant, then a 51-year-old maintenance worker, sustained a fracture of the radius and ulna of the left wrist and a sprain of the left upper arm, shoulder and acromioclavicular (AC) joint when she tripped and fell on some plastic which had been left on a floor, landing on her left hand. July 21, 2010 x-rays showed an acute comminuted fracture of the distal radius with fracture line extending through the articular surface.

In a September 13, 2010 report, Dr. Chenicheri Balakrishnan, an attending Board-certified orthopedic surgeon, noted a preexisting history of bilateral chronic wrist pain requiring splints.

On March 3, 2011 appellant filed a claim for a schedule award (Form CA-7). In a March 11, 2011 letter, OWCP advised her of the evidence needed to establish her schedule award claim, including a report from her attending physician evaluating permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Following a course of physical therapy, Dr. Balakrishnan released appellant from care on June 6, 2011, finding that the left wrist fracture and tendinitis had resolved.[3] He found her able to resume full duty. Appellant returned to full duty with no restrictions on June 7, 2011.

In support of her schedule award claim, appellant submitted an August 5, 2011 impairment rating from Dr. William N. Grant, a Board-certified internist, who provided a history of injury and treatment and opined that she had attained maximum medical improvement. Dr. Grant related appellant's symptoms of "constant left wrist painful paresthesias" causing difficulties with activities of daily living. Appellant wore a "left wrist splint and a special glove for support of her left wrist." On examination, Dr. Grant found positive Tinel's and Phalen's signs. He diagnosed a closed fracture of the left radius and ulna and a left AC joint sprain. Referring to Table 15-23 of the A.M.A., *Guides*,[4] Dr. Grant found, using the range of motion (ROM) method, three percent impairment for left wrist flexion limited to 30 degrees, three percent impairment for extension limited to 30 degrees and two percent impairment for radial deviation limited to 10 degrees. He added the impairments to equal 10 percent. Dr. Grant also assessed nine percent impairment of the left upper extremity due to a grade 3 diagnosis-based

[3] A May 27, 2011 magnetic resonance imaging scan of the left wrist showed a small bony density adjacent to the triquetrum, possible fracture fragment and small cysts and changes in the lunate, triquetrum and trapezoid.

[4] Table 15-32, page 473 of the A.M.A., *Guides* is entitled "Wrist Range of Motion."

impairment (DBI) Class of Diagnosis (CDX) for entrapment/compression neuropathy at the wrist according to Table 15-23,[5] based on appellant's *Quick*DASH score of 72. He added the 9 and 10 percent impairments to total 19 percent permanent impairment of the left upper extremity.

On January 5, 2012 an OWCP medical adviser opined that Dr. Grant had not properly applied the A.M.A., *Guides* as he had not specified which tables he had used for each element of his impairment rating or fully explain his calculations. The medical adviser also stated that Dr. Grant's clinical findings did not comport with the medical or factual record.

On April 13, 2012 OWCP obtained a second opinion from Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. Dr. Obianwu noted that appellant had diabetes mellitus and her complaints of pain, weakness, stiffness, and episodic numbness in the left hand and wrist. He found flexion of the left wrist limited to 30 degrees, dorsiflexion at 60 degrees, ulnar deviation at 20 degrees, radial deviation at 10 degrees, diminished grip strength in the left hand and negative Tinel's and Phalen's signs. Dr. Obianwu noted full ROM of the left shoulder with a negative impingement test. He obtained x-rays showing that the left distal radius fracture was well healed, but that the ulnar styloid fracture had not united. X-rays of the left shoulder showed mild degenerative changes of the AC joint.

Referring to Table 15-3, the Wrist Regional Grid, and using the DBI method of rating Dr. Obianwu found class 1 for the CDX of fracture with residual symptoms did not apply to appellant as it suggested normal motion, whereas her disability was best characterized as a loss of motion. He therefore chose to use the ROM method as indicated in Table 15-32. Dr. Obianwu enclosed a worksheet finding that, according to Table 15-23, appellant had three percent impairment of the left upper extremity due to volar flexion limited to 30 degrees, three percent impairment for dorsiflexion limited to 40 degrees, two percent impairment for radial deviation at 10 degrees and two percent impairment for ulnar deviation limited to 20 degrees. He added these impairments to total 10 percent permanent impairment of the left upper extremity. In a February 6, 2013 report, an OWCP medical adviser concurred with Dr. Obianwu's impairment rating.

As Dr. Obianwu relied on the ROM method and not the DBI method, OWCP referred the record to another OWCP medical adviser for review. In an August 24, 2013 report, the medical adviser found that appellant had attained maximum medical improvement as of June 6, 2011, as her condition had stabilized and she was released from care. He explained that the DBI method was the preferred rating scheme for her impairment, noting that ROM loss was encompassed by the CDX classification. The medical adviser also noted that Dr. Obianwu's ROM measurements were not valid as he had documented only one motion per movement and not the three repetitions as required by the A.M.A., *Guides* at section 15.7.[6] He provided a class 1 CDX for left wrist fracture. The medical adviser found a grade modifier of 1 for Functional History

[5] Table 15-23, page 449 of the A.M.A., *Guides* is entitled "Entrapment/Compression Neuropathy Impairment."

[6] Section 15.7 of the A.M.A., *Guides* is entitled "Range of Motion Impairment." Section 15.7(a), "Clinical Measurements of Motion" at page 464, provides that following a warm-up of a minimum of three maximum ROMs, the examiner records "the active measurements from 3 separate [ROM] efforts."

(GMFH) according to Table 15-7[7] and a grade modifier of 1 for Physical Examination (GMPE) according to Table 15-8[8] for mild objective deficits on examination. He noted that there was no applicable modifier for Clinical Studies (GMCS) as the studies were used to determine the CDX. Applying the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), or (1-1) + (1-1), the medical adviser calculated a net adjustment of zero, leaving the CDX grade at C, equaling three percent permanent impairment of the left upper extremity.

By decision dated September 23, 2013, OWCP granted appellant a schedule award for three percent impairment of the left upper extremity, based on Dr. Obianwu's clinical findings as interpreted by OWCP's medical adviser. The period of the award ran from June 6 to August 10, 2011.

On September 30, 2013 counsel requested a telephonic hearing, held March 3, 2014. At the hearing, he asserted that OWCP should have relied on Dr. Obianwu's impairment rating as the ROM based assessment method was better suited to appellant's presentation. Counsel also contended that OWCP should not have referred the case to the second medical adviser.

By decision dated and finalized April 4, 2014, an OWCP hearing representative affirmed the September 23, 2013 schedule award, finding that OWCP had properly relied on the opinion of OWCP's medical adviser. The hearing representative found that the medical adviser applied the appropriate portions of the A.M.A., *Guides* to Dr. Obianwu's clinical findings and provided detailed rationale explaining why the DBI method was superior to the ROM based method in appellant's case.

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]

[7] Table 15-7 page 406 of the sixth edition of the A.M.A., *Guides* is entitled "Functional History Adjustment: Upper Extremities"

[8] Table 15-8, page 408 of the sixth edition of the A.M.A., *Guides* is entitled "Physical Examination Adjustment: Upper Extremities."

[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).

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).[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 has established that she sustained greater than three percent impairment of the left upper extremity, for which she 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 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 are 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 has 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 finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.[16]

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[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] *Supra* note 14.

extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the April 4, 2014 decision. Following OWCP's development of 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 this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.[17]

Issued: February 22, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[17] James A. Haynes, Alternate Judge, participated in the original decision, but was no longer a member of the Board effective November 16, 2015.