United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 14-1499**
	)	**Issued: February 22, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, 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 June 17, 2014 appellant, through counsel, filed a timely appeal from a May 14, 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 this case.

ISSUE

The issue is whether appellant met her burden of proof to establish more than one percent permanent impairment of her right arm, for which he 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 September 15, 2010 OWCP accepted that appellant, then a 53-year-old service and sales associate, sustained calcifying tendinitis of her right shoulder due to performing her repetitive job duties over time. Beginning September 30, 2010, she received compensation for periods of disability on the daily rolls. Appellant returned to work for the employing establishment and stopped receiving disability compensation in December 2010.

On April 19, 2012 appellant filed a claim for a schedule award (Form CA-7).

By letter dated April 23, 2012, OWCP requested that appellant submit additional factual and medical evidence in support of her schedule award claim, including an impairment rating, which applied the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (6th ed. 2009).

In a report dated May 7, 2012, Dr. Victor Romano, an attending Board-certified orthopedic surgeon, described appellant's medical history and reported the findings of his examination of her right shoulder on that date. He noted that external and internal rotator strength was 5/5 and that sensation was intact to light touch throughout the shoulder. Dr. Romano reported range of motion (ROM) findings for appellant's right shoulder indicating that she had active and passive flexion to 150 degrees, active and passive abduction to 160 degrees, and active and passive extension to 60 degrees. Appellant had passive extension to 60 degrees, external rotation in an abducted position to 90 degrees, and internal rotation in an abducted position to 50 degrees. Dr. Romano diagnosed mild rotator cuff tendinitis of the right shoulder.

In an accompanying impairment rating worksheet dated May 7, 2012, Dr. Romano indicated in the functional history portion of the worksheet that an attached pain disability questionnaire completed by appellant showed a "mild" score of 25. Clinical studies were represented by magnetic resonance imaging (MRI) scans from 2010, which showed tendinitis and impingement syndrome of her right shoulder. Dr. Romano listed the ROM findings for appellant's right shoulder and indicated that, using the ROM rating method under Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides*, she had eight percent impairment of her right arm due to her limited right arm motion. He indicated that appellant's impairment fell under grade modifier 1 and that her functional history score did not alter the impairment rating.[3] Therefore, appellant had eight percent permanent impairment of her right arm.

In a May 28, 2012 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that, by all accounts, appellant's right shoulder condition was "mild." Appellant reported that pain did not keep her up at night and she had returned to work full duty. Dr. Garelick stated that physical examination demonstrated near full ROM of her right shoulder and internal and external rotation strength was noted to be normal in

[3] *See* A.M.A., *Guides* 477, Table 15-35, Table 15-36.

a December 21, 2010 note. Impingement signs of the right shoulder were classified as mild. Dr. Garelick stated:

> "Dr. Romano has submitted notes to the medical record and has recommended [eight percent] [right upper extremity (RUE) permanent partial impairment (PPI)] based on loss of shoulder motion. However, given the OWCP prefers PPI ratings based on a [diagnosis-based [impairment] estimate (DBI)] whenever possible, and [appellant's] condition of impingement syndrome is thoroughly addressed in the DB[I] section of the 6th edition of the A.M.A., *Guides*, I would suggest his rating he disregarded."
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> "Thus, based on Table 15-5, page 402 of the A.M.A., *Guides*, [one percent] RUE PPI is awarded for residual symptoms of impingement syndrome. There would be no alteration to this award with use of the net adjustment formula. The date of [maximum medical improvement (MMI)] would have occurred on January 25, 2011 when she was discharged from Dr. Romano's care. Right upper extremity PPI = [one percent]. Date of MMI = January 25, 2011."

By decision dated August 15, 2012, OWCP granted appellant a schedule award for one percent permanent impairment of her right arm. The award ran for 3.12 weeks from January 25 to February 15, 2011 and was based on the May 28, 2012 impairment rating of Dr. Garelick. Appellant requested a hearing before an OWCP hearing representative.

In an October 17, 2012 report, Dr. Neil Allen, an attending Board-certified internist and neurologist, detailed appellant's history of medical treatment and reported findings of the physical examination of her right shoulder on that date. He indicated that she had tenderness over her right acromioclavicular joint, that there was no instability in her right shoulder and that strength was 5/5 in her right shoulder. Dr. Allen used the ROM method and found that, under Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides*, her 152 degrees of flexion equaled three percent permanent impairment of her right arm and her 131 degrees of abduction equaled three percent impairment of her right arm.[4] With respect to his use of the ROM method and the adjustment for functional history, he stated:

> "According to A.M.A., *Guides*, 6th edition, page 473 'Adjustments for functional history may be made if: (1) [ROM] impairment is the only approach used to rate the extremity, (2) there are reliable findings of motion impairment, (3) the evaluator determines that the resulting impairment does not adequately reflect the functional loss, and (4) the functional reports are determined to be reliable.' In this case, [ROM] was the only approach used to rate the extremity, goniometry determined a reliable and consistent decreased [ROM] compared to [appellant's]

[4] Dr. Allen indicated that there was no impairment of appellant's right arm due to her 56 degrees of extension, 50 degrees of adduction, 90 degrees of internal rotation, and 72 degrees of external rotation. He also reported ROM findings for her left shoulder: 180 degrees of flexion, 70 degrees of extension, 181 degrees of abduction, 55 degrees of adduction, 110 degrees of internal rotation, and 90 degrees of external rotation.

> unaffected side, the resulting impairment did not adequately reflect her functional loss and her functional history was determined reliable by being within 2 grade modifiers of the [ROM] impairment. According to Table 15-36, page 477, *Functional History Grade Adjustment: Range of Motion*, if the functional history grade modifier is one grade higher than the [ROM] grade modifier the total [ROM] impairment is multiplied by [five percent]. This increased [appellant's upper extremity] impairment to 6.3 [percent,] which was then rounded to the nearest whole number for a total upper extremity impairment of 6 [percent].
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> "According to the A.M.A., *Guides*, 6th edition, page 390, '[ROM] may under specific circumstances, be selected as an alternative approach to rating impairment. Diagnoses in the grid that may be rated using [ROM] are followed by an asterisk (*). An impairment rating that is calculated using [ROM] may not be combined with DBI; it stands alone as a rating.' In [appellant's] case of tendinitis of the right shoulder the [ROM] method reflected a more accurate impairment than the DBI method."

In a February 20, 2013 decision, an OWCP hearing representative set aside an August 15, 2012 decision and remanded the case to OWCP for further development. OWCP was instructed to have an OWCP medical adviser review Dr. Allen's October 17, 2012 report and evaluate whether it supported that appellant had a six percent permanent impairment of her right arm. The hearing representative directed OWCP to issue a new decision on her right arm impairment after appropriate development was carried out.

On April 22, 2013 Dr. Garelick, again serving as an OWCP medical adviser, stated that, since his last report, appellant had experienced exacerbation of symptoms which had been successfully treated with activity modification and physical therapy. Appellant's physical examination was essentially unchanged since May 2012. Dr. Garelick noted that Dr. Allen recommended six percent right arm impairment and that Dr. Romano recommended eight percent right arm impairment, noting that both physicians used the ROM method to evaluate the impairment. He indicated that the sixth edition of the A.M.A., *Guides* was different from previous editions of the A.M.A., *Guides* in that a system of awards based on the DBI method, rather than on the ROM method, had been introduced. Dr. Garelick noted that the A.M.A., *Guides* was quite clear in stating that the DBI method should be used whenever possible. He stated that, as noted in Chapter 16 of the sixth edition of the A.M.A., *Guides* (on page 543), the DBI method was the method of choice for calculating impairment. ROM was used principally as a factor in the adjustment grid physical examination and ROM may be used as a stand-alone rating when no other DBI is applicable for impairment rating. Dr. Garelick indicated that impingement syndrome constituted a DBI of appellant's right shoulder. He strongly suggested that the DBI method be used and that the recommendations from Dr. Allen and Dr. Romano be disregarded. Dr. Garelick stated, "Therefore, I continue to maintain that [appellant] is due [one percent] RUE PPI. The date of MMI will be changed to reflect the recent exacerbation. I would suggest [that] the date of Dr. Allen's report, October 17, 2012, represent the new date of MMI."

By decision dated October 9, 2013, OWCP determined that appellant had not met her burden of proof to establish more than a one percent permanent impairment of her right arm. It

noted that the weight of the medical evidence with respect to her right arm impairment rested with the opinion of Dr. Garelick, the medical adviser.

Appellant requested a telephone hearing with an OWCP hearing representative. During the March 12, 2014 hearing, counsel asserted that OWCP wrongly discounted the impairment ratings from her attending physicians which used the ROM method of rating arm impairment. He asserted that OWCP procedures dictated that the opinion of the medical adviser should not constitute the weight of the medical evidence in the present case.

In a May 14, 2014 decision, the hearing representative affirmed OWCP's October 9, 2013 decision, finding that appellant had no more than one percent permanent impairment of his right arm.

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.[5] 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.[6] 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.[7]

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).[8] 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.[9]

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[5] *See* 20 C.F.R. §§ 1.1-1.4.

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

[7] 20 C.F.R. § 10.404. *See also, Ronald R. Kraynak*, 53 ECAB 130 (2001).

[8] 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).

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

ANALYSIS

The issue on appeal is whether appellant has more than one percent impairment of her right upper arm, 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.[10] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[11] 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.[12]

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 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 May 14, 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.

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

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

[12] *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.[13]

Issued: February 22, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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