United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 14-1683**
	)	**Issued: February 13, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Hines, IL, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2014 appellant, through counsel, filed a timely appeal from a July 11, 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.

[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.

FACTUAL HISTORY

OWCP accepted that on February 8, 2012 appellant, then a 56-year-old recreational assistant, sustained a contusion of the left shoulder and upper arm when she was struck by a combative patient. Dr. Stephen Kalmar, an attending Board-certified family practitioner, diagnosed on February 13, 2012 a left biceps tear and left humeral injury. Beginning on March 5, 2012 appellant was followed by Dr. Erling Ho, an attending Board-certified orthopedic surgeon. In reports through June 27, 2012, Dr. Ho diagnosed left rotator cuff tendinopathy and a partial thickness supraspinatus tear, confirmed by a May 11, 2012 magnetic resonance imaging (MRI) scan.

On July 12, 2012 Dr. Ho performed an arthroscopic subacromial decompression of the left shoulder, arthroscopic debridement of the glenohumeral joint, and a mini-open biceps tenodesis with the incision in the axillary fold. OWCP authorized the surgical procedures. Dr. Ho submitted progress notes through March 13, 2013, when he found that appellant had attained maximum medical improvement. He noted active abduction and forward flexion to 160 degrees and external rotation at 70 degrees. Dr. Ho observed 4+/5 strength with resisted abduction. He provided permanent work restrictions and discharged appellant from care.

On April 15, 2013 appellant filed a claim for a schedule award (Form CA-7). In a May 13, 2013 letter, OWCP advised appellant of the evidence needed to establish her schedule award claim, including a report from her attending physician evaluating the extent of her permanent impairment of her left upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, "A.M.A., *Guides*").[3]

In support of her schedule award claim, appellant submitted a July 1, 2013 impairment rating from Dr. James P. Elmes, a Board-certified orthopedic surgeon, who reviewed medical records and provided a history of injury and treatment. Dr. Elmes concurred that appellant had attained maximum medical improvement. On examination of the left upper extremity, he noted diminished grip strength, 4/5 weakness, no measurable atrophy, and a normal neurologic examination. Dr. Elmes obtained ranges of motion "based on average of three measurements with the goniometer." Referring to the A.M.A., *Guides*, he explained that according to pages 298 and 299 of the A.M.A., *Guides* regarding transition to the sixth edition, appellant's impairment could be rated either using the diagnosis-based impairment (DBI) method under Table 15-5,[4] the Shoulder Regional Grid, or the range of motion method according to Table 15-34.[5] Dr. Elmes selected the range of motion method as it provided "the higher possible

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

[4] Table 15-5, page 401 is entitled "Shoulder Regional Grid: Upper Extremity Impairments."

[5] Table 15-34, page 475 is entitled "Shoulder Range of Motion."

rating." He opined that appellant's left shoulder pain was caused by left rotator cuff tendinopathy, bicipital tenosynovitis, and moderate degenerative joint disease of the left acromioclavicular joint. Dr. Elmes selected degenerative joint disease as the diagnosis causing the greatest impairment, which could be rated using the range of motion method. Referring to Table 15-34, he assessed the following percentages of impairment: three percent for flexion at 150 degrees; one percent for extension at 40 degrees; three percent for abduction at 160 degrees; and two percent for internal rotation at 70 degrees. Dr. Elmes combined these impairments to equal eight percent permanent impairment due to loss of range of motion. Referring to Table 15-35,[6] he found a grade modifier of 1, raising the Class of Diagnosis (CDX) to 12 percent. Dr. Elmes noted a grade modifier for Functional History (GMFH) of 3 for severe problems, demonstrated by a *Quick*DASH score of 67.5 due to less than normal vocational, social, and recreational activities. He explained that because the *Quick*DASH score above 60 was inconsistent with a mild impairment, it raised "questions about the reliability and accuracy of the diagnosis and whether symptom magnification [was] present." Dr. Elmes therefore declined to include the GMFH, leaving the left upper extremity permanent impairment rating at eight percent.

On March 14, 2014 OWCP referred Dr. Elmes' opinion to Dr. David H. Garelick, Board-certified in orthopedic surgery and sports medicine and serving as an OWCP medical adviser, for review and calculation of an impairment rating. Dr. Garelick provided a March 17, 2014 report finding that appellant had reached maximum medical improvement as of Dr. Ho's March 13, 2013 examination. He disagreed with Dr. Elmes' use of the range of motion rating method which, according to page 387 of the A.M.A., *Guides*, was used "primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairment; this is a significant change from prior editions." The medical adviser opined that Dr. Elmes' opinion should be disregarded due to his misinterpretation of the A.M.A., *Guides*. He recommended three percent impairment of the left upper extremity "for a biceps tendon lesion as noted in Table 15-5, page 404 of the A.M.A., *Guides*," with no applicable grade modifiers.

By decision dated April 3, 2014, OWCP granted appellant a schedule award for three percent permanent impairment of the left upper extremity, based on Dr. Elmes' clinical findings as interpreted by OWCP medical adviser.

In an April 11, 2014 letter, counsel requested reconsideration. He asserted that, according to the A.M.A., *Guides*, if there were two possible methods for rating a permanent impairment OWCP was obligated to select the method that resulted in a higher percentage of impairment.

By decision dated July 11, 2014, OWCP affirmed the April 3, 2014 schedule award. It found that Dr. Elmes misapplied the A.M.A., *Guides* as he included degenerative joint disease of the left acromioclavicular joint, a condition not accepted by OWCP.

[6] Table 15-35, page 477 is entitled "Range of Motion Grade Modifiers."

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 the Office of Workers' Compensation Programs.[7] 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.[8] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[9]

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).[10] 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.[11]

ANALYSIS

The issue on appeal is whether appellant has established more than three percent permanent 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 range of motion methodology when assessing the extent of permanent impairment for schedule award

[7] *See* 20 C.F.R. §§ 1.1-1.4.

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

[9] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[10] 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).

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

purposes.[12] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[13] 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 range of motion 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 range of motion 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.[14]

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 July 11, 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.

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

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

[14] *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.[15]

Issued: February 13, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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