United States Department of Labor
Employees' Compensation Appeals Board

H.E., Appellant	)	
and	)	**Docket No. 15-0376**
	)	**Issued: February 9, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 9, 2014 appellant, through counsel, filed a timely appeal from a September 3, 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 case.

ISSUE

The issue is whether OWCP properly denied appellant's claim for 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 November 23, 2007 appellant, then a 45-year-old manual distribution clerk injured his wrist, shoulders, legs, and arms while lifting, pushing, and pulling buckets of mail in the performance of duty. OWCP accepted his claim for bilateral wrist and elbow strains and later expanded the claim to include bilateral tendinitis of the dorsal extensor tendons. Appellant stopped work on November 22, 2007 and returned to full-time duty on March 26, 2013.

Appellant was treated by Dr. Jeff Kirschman, a Board-certified orthopedic surgeon, from November 27, 2007 to April 26, 2011, for bilateral wrist and elbow pain. He diagnosed strain of the wrists and sprain of the elbows. A November 27, 2007 x-ray of the left wrist revealed a possible nondisplaced fracture involving the radial styloid process. An electromyogram (EMG) dated February 5, 2013 revealed no evidence of carpal tunnel syndrome or cervical radiculopathy, but could not exclude radiculopathy. In developing the claim, OWCP also referred appellant to several second opinion physicians.

Appellant continued to be treated by Dr. Kirschman. On April 9, 2013 Dr. Kirschman noted appellant's left elbow and bilateral wrist pain. He noted that appellant returned to work on March 26, 2013 with restrictions. Dr. Kirschman noted findings of the elbows of no swelling, effusion or tenderness, full range of motion (ROM), and intact strength bilaterally. Examination of the wrists and hands revealed no swelling, normal ROM, diffuse tenderness over the dorsums of the wrists and left radial wrist, normal strength limited by pain, negative Phalen's test, and intact grip strength. In a May 14, 2013 report, Dr. Kirschman noted that examination results remained unchanged and opined that appellant was at maximum medical improvement.

On June 6, 2013 appellant filed a claim for a schedule award (Form CA-7). He submitted a May 23, 2013 impairment rating from Dr. Martin Fritzhand, a specialist in preventative medicine, who reviewed the history of injury and treatment. On examination, Dr. Fritzhand found flexion of the elbows was normal to 140 degrees bilaterally, extension was normal to zero degrees bilaterally, supination and pronation of the forearms and at the elbows was normal to 80 degrees bilaterally, with tenderness on palpation of the right olecranon and left lateral epicondyle. He noted dorsiflexion of the wrists was normal to 60 degrees bilaterally, palmar flexion diminished to 50 degrees on the right and 40 degrees on the left, ulnar deviation of the wrist was normal to 30 degrees on the right and diminished to 20 degrees on the left, and radial deviation diminished to 0 degrees on the right and 10 degrees on the left. Pinprick and light touch reaction was diminished over the radial aspect of the left forearm.

Dr. Fritzhand found that appellant had reached maximum medical improvement. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*),[3] he noted using Table 15-3, for a diagnosis of right wrist sprain/strain. Dr. Fritzhand noted that the *Quick*DASH score was 77 on the right and 84 on the left. He noted that, if motion loss was present, impairment could alternatively be assessed using the ROM method under section 15.7, Range of Motion Impairment. Dr. Fritzhand, under the ROM method, used Table 15-32 of the A.M.A., *Guides* and noted palmar flexion of the right

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

wrist indicated upper extremity impairment of three percent; extension was zero percent, radial deviation was four percent, and ulnar deviation was zero percent for seven percent impairment of the right upper extremity. For the left wrist he noted palmar flexion indicated upper extremity impairment of three percent, extension was zero percent, radial deviation was two percent, ulnar deviation was two percent for seven percent impairment of the left arm upper extremity.

Dr. Fritzhand noted using Table 15-4, for a diagnosis of elbow/forearm sprain/strain. Pursuant to Table 15-7, he assessed a grade 1 modifier for Functional History (GMFH), a grade 1 modifier for Physical Examination (GMPE), and the grade 0 modifier for Clinical Studies (GMCS). Dr. Fritzhand noted this resulted in one percent impairment to each arm. He used the Combined Values Chart and opined that appellant had a total permanent eight percent impairment to each upper extremity under the ROM method. Dr. Fritzhand included a *Quick*Dash questionnaire with scores of 77 for the right wrist and elbow and 84 for the left wrist and elbow.

In a June 13, 2013 report, an OWCP medical adviser reviewed the medical record and Dr. Fritzhand's impairment determination. He opined that appellant had no ratable permanent impairment attributable to either the wrists or elbows. The medical adviser noted using the preferred diagnosis-based impairment (DBI) method to rate the impairment of bilateral wrist sprain. He noted that Dr. Fritzhand used the less preferred wrist ROM method with invalid measurements and arrived at seven percent impairment for each upper extremity. The medical adviser indicated that Dr. Fritzhand documented only one motion per joint movement which was not consistent with the validity criteria in section 15.7 for measuring ROM. Therefore, the ROM measurements were not valid for impairment calculations and no other objective deficits were documented.

The medical adviser noted that, under the DBI method, appellant was a class 1 for bilateral wrist sprain. He found GMFH to be unreliable results the *Quick*DASH scores (77 percent for the right wrist and 84 percent for the left wrist) created unrealistically high grade modifiers of 3 and 4 respectively. The medical adviser noted that the A.M.A., *Guides* provide that a GMFH that differs by two or more grades from those of GMPE or GMCS are unreliable, inconsistent and excluded from the grading process.[4] He noted the GMPE was zero as Dr. Fritzhand documented only one motion per joint movement which was inconsistent with the validity criteria in 15.7 of the A.M.A., *Guides*.[5] The medical adviser noted that the GMCS was zero as the x-rays of the wrists revealed no acute disease, no left radial styloid fracture was confirmed, and the EMG testing on February 5, 2013 was normal. Applying the net adjustment formula of (GMFH - Class of Diagnosis (CDX)) + (GMPE - CDX) + (GMCS - CDX), the medical adviser found a net adjustment of -2 for a grade A or zero percent bilateral upper extremity impairment for the bilateral wrist sprain.

With regard to the bilateral elbow sprain, the medical adviser placed appellant into a class 1. He again found GMFH to be unreliable as noted above referencing the right upper extremity *Quick*DASH scores of 77 percent and the left upper extremity score of 84 percent. The medical

[4] *Id*. at 406.

[5] *Id*. at 464.

adviser noted that the GMPE was zero because Dr. Fritzhand had documented only one motion per joint movement which was inconsistent with the validity criteria in 15.7 of the A.M.A., *Guides* for measuring ROM.[6] With regard to the GMCS, he found it to be zero as the x-rays of the elbows demonstrated no acute disease and the EMG performed on February 5, 2013 was normal. Applying the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), the medical adviser found a net adjustment of -2, for a grade A or zero percent for the accepted elbow conditions. He noted that the final bilateral upper extremity arm impairment for the accepted wrist and elbow conditions was zero percent.

Appellant submitted reports from Dr. Kirschman dated June 11 and July 9, 2013 who treated appellant in follow-up for bilateral wrist and elbow pain. He noted diffuse pain over the dorsums of the wrist bilaterally and diagnosed strain of the wrist and elbow. Dr. Kirschman noted that appellant had reached maximum medical improvement.

On December 9, 2013 OWCP denied appellant's claim for a schedule award.

Appellant requested an oral hearing which was held on April 25, 2014. He submitted a May 19, 2014 report from Dr. Kirschman who treated appellant in follow up for bilateral wrist and elbow pain. Appellant diagnosed bilateral wrist strains and bilateral elbow sprains.

In a decision dated September 3, 2014, an OWCP hearing representative affirmed the December 19, 2013 finding of zero percent permanent 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 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 A.M.A., *Guides* 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., *Guides* issued a 52-page document entitled "Clarifications and Corrections, [s]ixth [e]dition [of the A.M.A.,] *Guides.*" The document included various changes

[6] *Id*.

[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).

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 OWCP properly denied appellant's claim for a schedule award.

The Board finds this case 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.[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 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.[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 September 3, 2014 decision. Following OWCP's development of a consistent method for calculating permanent

[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).

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

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

[14] *Supra* note 12.

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 September 3, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: February 9, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board