

**United States Department of Labor
Employees' Compensation Appeals Board**

R.R., Appellant)
and) Docket No. 15-0819
U.S. POSTAL SERVICE, SHAKER HEIGHTS) Issued: February 22, 2017
POST OFFICE, Cleveland, OH, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
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 February 26, 2015 appellant, through counsel, filed a timely appeal from a January 29, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has more than four percent permanent impairment of her left upper extremity, for which she 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 July 28, 2005 appellant, a 47-year-old mail carrier, sustained an injury in the performance of duty when her ankle gave way, causing her to fall. She tried to catch herself with her hands and injured her left arm. OWCP accepted appellant's claim for a left shoulder sprain/strain.

Appellant filed a claim for a schedule award (Form CA-7). Dr. Jessica Glazer Volsky, the attending osteopath, evaluated appellant and found that she had six percent permanent impairment of the left upper extremity due to loss of shoulder flexion and abduction. She explained that she was using the range of motion method of rating permanent impairment as a permissible alternative to the diagnosis-based impairment (DBI) method under Table 15-5 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*). Dr. Volsky noted that appellant had a QuickDASH score of 48 and had to perform functional modification to achieve self-care activities. She also noted tenderness to palpation on physical examination.

An OWCP medical adviser noted that range of motion is used primarily as a physical examination adjustment factor under the DBI method and only to determine actual impairment values "in the rare case when it is not possible to otherwise define impairment." He observed that appellant's impairment could be evaluated using the preferred DBI method using the diagnosis of tendinitis on page 402. The medical adviser determined that appellant had four percent permanent impairment of the left upper extremity based on this method with an upward adjustment of the default impairment value for functional history. Further, he noted that Dr. Volsky had documented only one motion per joint movement, whereas the A.M.A., *Guides* required three separate measurements for each joint movement and a comparison with the opposite unaffected extremity.

Dr. Volsky responded that, while she agreed with an OWCP medical adviser that range of motion should be used when no other approach is available, Table 15-3 allowed impairment to be alternately assessed using range of motion. As appellant had motion loss on the day of her examination, she qualified for an evaluation based on range of motion. Dr. Volsky advised that she had taken a course on the sixth edition of the A.M.A., *Guides* given by one of the book's authors, and she was comfortable with her understanding and interpretation of the A.M.A., *Guides*.

OWCP expanded its acceptance of appellant's claim to include impingement syndrome of the left wrist.

An OWCP medical adviser noted that Dr. Volsky had not provided additional information supporting the validity of her range of motion measurements. He repeated that the DBI method was the preferred method of evaluation and was appropriate for the objective right shoulder pathology observed in appellant's case.

On April 24, 2014 OWCP issued a schedule award for four percent permanent impairment of appellant's left upper extremity.

Appellant, through counsel, requested a telephonic hearing on May 5, 2014 before an OWCP hearing representative, which was held on November 14, 2014.

In a decision dated January 29, 2015, an OWCP hearing representative affirmed appellant's schedule award. She found no conflict in medical opinion or need for a new evaluation.

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.³ 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.⁴ 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.⁵

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).⁶ 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.⁷

ANALYSIS

The issue on appeal is whether appellant has more than four percent impairment of her left upper extremity, for which he received schedule awards.

³ See 20 C.F.R. §§ 1.1-1.4.

⁴ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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

⁶ 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).

⁷ *Isidoro Rivera*, 12 ECAB 348 (1961).

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 purposes.⁸ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.⁹ 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.¹⁰

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 January 29, 2015 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.

⁸ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

⁹ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁰ *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.¹¹

Issued: February 22, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹¹ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.