United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 15-1591**
	)	**Issued: February 17, 2017**
DEPARTMENT OF HOMELAND SECURITY, Philadelphia, PA, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 21, 2015 appellant, through counsel, filed a timely appeal of a June 5, 2015 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)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has more than four percent permanent impairment of his left upper extremity for which he previously 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.*

On appeal, counsel argues that the attending physician's assessment of permanent impairment should be used rather than that of OWCP's medical adviser.

FACTUAL HISTORY

On November 22, 2010 appellant, then a 33-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he sustained a possible sprain, strain, or tear in his left shoulder while throwing a punch on November 5, 2010. Dr. Glenn M. Zuck, an osteopath, examined appellant on December 6, 2010 and diagnosed a possible rotator cuff tear in the left shoulder due to appellant's performance of defensive tactics in his training program as a federal air marshal. On December 8, 2010 he reviewed appellant's magnetic resonance imaging (MRI) scan and found a superior labral tear in the left shoulder. OWCP accepted appellant's claim for sprain of the shoulder and upper arm on November 15, 2010.

Appellant filed a recurrence of disability claim (Form CA-2a) on June 20, 2012 alleging that on June 14, 2012 he sought medical treatment for his November 15, 2010 employment injury. He stated that he had performed full duty since his injury and had developed increasing soreness and discomfort in his shoulder and elbow.

On June 14, 2012 Dr. Marc I. Harwood, a physician of professorial rank Board-certified in sports medicine, noted appellant's history of injury in October 2010 and reviewed his MRI scan findings. He noted that appellant had pain with all activities of the shoulder particularly with overhead activities and working out. Dr. Harwood further noted that appellant's shoulder pain occasionally radiated down the medial aspect of his upper arm to his elbow. Appellant's left shoulder demonstrated 170 degrees of forward flexion with pain, 90 degrees of external rotation, and 90 degrees of internal rotation. Dr. Harwood found positive Hawkins, O'Brien, and Neer signs. He reported pain with no appreciable weakness to supraspinatus, infraspinatus, and subscapularis testing. Dr. Harwood recommended an MRI scan arthrogram.

By decision dated July 17, 2012, OWCP accepted appellant's claim for left shoulder superior labral tear. It also accepted appellant's recurrence of disability on June 14, 2012 through a separate decision dated July 17, 2012.

Appellant underwent a left shoulder MRI scan on July 27, 2012 which demonstrated tear and detachment of the glenoid labrum with a partial thickness tear of the supraspinatus tendon. Dr. Harwood reviewed this test on August 6, 2012 and diagnosed left shoulder labral tear. He recommended surgery. Dr. Michael G. Ciccotti, a Board-certified orthopedic surgeon, performed a left shoulder arthroscopy with antero-inferior labral repair, superior labral repair, posterior labral repair, and inferior labral debridement on September 12, 2012.

On February 27, 2013 Dr. Ciccotti determined that appellant sustained a retear of the superior and posterior labrum during physical therapy in January 2013 based on a February 19, 2013 MRI scan arthrogram. On March 29, 2013 he performed a left shoulder arthroscopy with revision posterior labral repair and labral debridement.

On March 6, 2013 OWCP requested that appellant provide information regarding his benefits by completing a Form CA-1032. By decision dated May 3, 2013, it suspended appellant's compensation benefits due to his failure to submit a completed Form CA-1032.

In a report dated December 19, 2013, Dr. Ciccotti found that appellant had achieved a full outcome with minimal soreness in his left shoulder. He reported forward flexion of 170 degrees, abduction of 170 degrees, internal rotation of 35 degrees, and external rotation of 115 degrees. Dr. Ciccotti stated that appellant demonstrated mild tenderness over his deltoid laterally and his triceps with no periscapular tenderness, no acromiclavicular (AC) joint tenderness and no posterior joint line tenderness.

Appellant requested a schedule award through a claim for compensation (Form CA-7) dated July 24, 2014. OWCP requested additional medical opinion in support of appellant's claim on August 12, 2014.

Dr. David Weiss, an osteopath, examined appellant on June 5, 2014 and noted appellant's history of injury on November 15, 2010 as well as his medical treatment. He found that appellant's *Quick*DASH score was 34 percent involving the left upper extremity. Dr. Weiss examined appellant's left shoulder and found focal AC point tenderness as well as tenderness along the anterior cuff. He reported appellant's range of motion varying between flexion of 160 to 170 degrees, abduction 160 to 180 degrees, external rotation of 80 to 90 degrees and internal rotation of 75 degrees. Dr. Weiss found crepitus with circumduction, but that appellant's manual muscle strength testing was normal. Dr. Weiss applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] and found that in accordance with Table 15-34, using the range of motion method,[4] appellant had three percent impairment due to flexion of 160 degrees, three percent impairment due to abduction of 160 degrees and one percent impairment due to internal rotation of 75 degrees. He concluded that appellant had seven percent impairment of his left upper extremity.

OWCP's medical adviser reviewed Dr. Weiss' report and the remainder of the medical record on August 28, 2014. He found that the date of maximum medical improvement was June 5, 2014. The medical adviser used the diagnosis-based impairment (DBI) rating method of the A.M.A., *Guides* and found a grade modifier of 1 for functional history[5] as appellant's left shoulder was still symptomatic, a grade modifier of 1 for physical examination due to loss of shoulder range of motion,[6] and a grade modifier of 2 for clinical studies based on the arthrogram

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

[4] *Id.* at 475, Table 15-34.

[5] *Id.* at 406, Table 15-7.

[6] *Id.* at 408, Table 15-8.

and MRI scans.[7] He applied the appropriate formula and determined that appellant had grade D, four percent impairment of his left upper extremity due to a labrum lesion.[8]

OWCP's medical adviser also provided an impairment rating based on the range of motion method. He found 170 degrees of flexion or three percent impairment of the upper extremity,[9] zero percent impairment due to 170 degrees of abduction, zero percent impairment due to 80 degrees of adduction, zero percent impairment due to 80 degrees of internal rotation, and zero percent impairment due to 80 degrees of external rotation. The medical adviser noted that appellant's loss of range of motion equated to three percent impairment of the upper extremity or grade modifier 1.[10]

By decision dated December 18, 2014, OWCP granted appellant a schedule award for four percent permanent impairment of the left upper extremity.

Counsel requested reconsideration on March 5, 2015 and submitted an additional report from Dr. Weiss. On February 25, 2015 Dr. Weiss disagreed with the grade modifier 1 for physical examination, finding that appellant should have received a grade modifier of 2 based on moderate palpatory findings consistently documented. He further found that based on appellant's diagnostic testing, the clinical studies grade modifier should be 4 as appellant's arthrogram demonstrated a tear and detachment of the glenoid labrum and moderate delamination-type partial thickness tear of the supraspinatus tendon.[11] Dr. Weiss concluded that appellant was entitled five percent permanent impairment based on the DBI method.

Dr. Weiss also asserted that an impairment rating using the range of motion method was appropriate based on the A.M.A., *Guides* for a labral lesion.[12] He explained, "Since this claimant had undergone two arthroscopic surgical procedures and not significant left shoulder pain and weakness it was my opinion that the range of motion would more accurately reflect his impairment rating."

OWCP's medical adviser reviewed Dr. Weiss' February 25, 2015 report on June 4, 2015. He opined that Dr. Weiss had appropriately applied the A.M.A., *Guides* to reach his calculations of appellant's impairment due to loss of range of motion, but had not utilized range of motion figures demonstrating appellant's maximum effort in his calculations and so had reached a greater impairment rating than that to which appellant was entitled. The medical adviser stated, "When the maximum effort is applied the final left [upper extremity impairment] is three percent. This is less than the [DBI] method for labral injury, so the [DBI] method is used for final calculations."

[7] *Id.* at 410, Table 15-9.

[8] *Id.* at 404, Table 15-5.

[9] *Id.* at 475, Table 15-34.

[10] *Id.* at 477, Table 15-35.

[11] *Id.* at 410, Table 15-9.

[12] *Id.* at 404, Table 15-5.

OWCP's medical adviser also disagreed with Dr. Weiss' assessment of the appropriate grade modifiers. He opined that a physical examination grade modifier of 2 was not appropriate as appellant's condition was mild following surgery and his range of motion figures were mild. The medical adviser noted, "Other physicians found better [range of motion] than Dr. Weiss near [maximum medical improvement] as well as only mild tenderness on exam[ination] (see Dr. Ciccotti's report dated December 19, 2013). As such the observed pathology and clinical findings are consistent with mild underlying pathology of [physical examination grade modifier] of 1, versus a [physical examination grade modifier] of 2 which is what Dr. Weiss assigned."

In regard to Dr. Weiss' assessment of the clinical studies grade modifier, the medical adviser noted that appellant's rotator cuff was found to be normal in both surgeries. He concluded that as appellant had only labrum tears he was entitled to a grade modifier 2 for clinical studies as opposed to grade modifier 4 as proposed by Dr. Weiss.

By decision dated June 5, 2014, OWCP denied modification of its December 18, 2014 schedule award decision, finding that appellant had no more than four percent permanent impairment of his left upper extremity in accordance with the reports of OWCP's medical adviser.

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.[13] 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.[14] 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.[15]

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.

[13] *See* 20 C.F.R. §§ 1.1-1.4.

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

[15] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[16] 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.[17]

ANALYSIS

The issue on appeal is whether appellant has more than four percent permanent impairment of his left upper extremity for which he 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 purposes.[18] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[19] 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.[20]

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 June 5, 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.

[16] 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).

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

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

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

[20] *Supra* note 18.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2015 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 17, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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