

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

T.E., Appellant)	
)	
and)	Docket No. 15-1864
)	Issued: February 17, 2017
DEPARTMENT OF HOMELAND SECURITY,)	
OFFICE OF FIELD OPERATIONS,)	
Orlando, FL, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>William Hackney, Esq., for the appellant¹</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 16, 2015 appellant, through counsel, filed a timely appeal from an August 19, 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 over the merits of this case.

ISSUE

The issue is whether appellant established more than four percent permanent impairment to the right upper extremity, for which she 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.*

FACTUAL HISTORY

On May 28, 2012 appellant, then a 38-year-old federal air marshal sustained a right arm injury after falling in the performance of duty. OWCP accepted the claim for sprained right shoulder and rotator cuff. The claim was later expanded to include right rotator cuff tear. OWCP authorized a July 25, 2012 right shoulder arthroscopy performed by Dr. Brian Maiocco, a Board-certified orthopedic surgeon. Appellant stopped work following surgery and later returned to a limited-duty position on November 14, 2012.

Dr. Maiocco continued to treat appellant postoperatively. On February 26, 2013 he noted that appellant complained of right shoulder weakness. Examination of the right shoulder revealed 170 degrees of forward flexion, 150 degrees of abduction, and 90 degrees of external rotation. Dr. Maiocco advised that appellant needed to work on strengthening, but range of motion (ROM) was good.

On May 8, 2013 OWCP requested that Dr. Maiocco address appellant's status, including whether she had reached maximum medical improvement (MMI). In a May 31, 2013 report, Dr. Maiocco advised that she had reached MMI. He noted that appellant had undergone a right shoulder arthroscopy with rotator cuff repair, subacromial decompression, debridement of a partial thickness labral tear, and synovectomy of joint. Dr. Maiocco opined that the surgery was successful overall, but noted that she had permanent right shoulder restrictions. He advised that using "Table 5-5" on page 403 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (hereinafter A.M.A., *Guides*) appellant had four permanent percent impairment to the right arm.

Appellant subsequently began treatment with Dr. Samy Bishai, an orthopedic surgeon. On January 22, 2014 Dr. Bishai noted her history and advised that she continued to have right shoulder symptoms and limitations. He noted examination findings, including ROMs of both shoulders. Dr. Bishai's diagnoses included internal derangement of the right shoulder joint. He and his associates continued to follow appellant.⁴

On August 11, 2014 appellant requested a schedule award (Form CA-7). In support of her request, she submitted a June 9, 2014 report from Dr. Bishai. Dr. Bishai noted that prior to appellant's examination he had reviewed her past medical records. Examination of the right shoulder revealed tenderness overlying the anterior, lateral, and posterior aspects of the right shoulder joint, 80 degrees of flexion, 20 degrees of extension, 80 degrees of abduction, 15 degrees of adduction, 45 degrees of external rotation, and 20 degrees of internal rotation.⁵ Dr. Bishai diagnosed internal derangement of the right shoulder joint, postoperative arthroscopic surgery of the right shoulder, internal derangement of the left shoulder, and left rotator cuff syndrome. He opined that appellant was at MMI as of June 9, 2014. Dr. Bishai noted that, using the sixth edition of the A.M.A., *Guides* and the stand-alone ROM method, she had 24 percent upper extremity impairment. He explained that he used the ROM method because it presented

³ A.M.A., *Guides* (6th ed. 2009).

⁴ Dr. Bishai also asserted that appellant had a consequential left shoulder condition. Any matter pertaining to the left shoulder is not presently before the Board.

⁵ These reported ROMs are consistent with the findings noted in Dr. Bishai's January 22, 2014 report.

the most significant impairment for appellant and it is caused her the greatest difficulty in performing the activities of daily living as well as performing her job duties. Dr. Bishai noted that using Table 15-34 of the A.M.A., *Guides* she had nine percent impairment for flexion, two percent for extension, six percent for abduction, one percent for adduction, four percent for internal rotation, and two percent for external rotation. He then combined the impairments for 24 percent permanent impairment of the arm. Dr. Bishai explained that the A.M.A., *Guides* recommend that the values are combined if they reflect movements of one joint.

On August 22, 2014 an OWCP medical adviser evaluated Dr. Maiocco's report and concurred with his four percent impairment rating.

In a September 29, 2014 decision, OWCP granted appellant a schedule award for four percent permanent impairment of the right upper extremity. The award ran for 12.48 weeks from May 31 through August 26, 2013.

On October 14, 2014 appellant requested an oral hearing, which took place on May 5, 2015. Counsel argued that Dr. Maiocco determined that she was at MMI on May 31, 2013, yet he last treated her on February 26, 2013. He also noted that the medical adviser failed to comment on Dr. Bishai's June 9, 2014 impairment rating.

By decision dated June 17, 2015, an OWCP hearing representative remanded the case. She instructed the medical adviser to consider Dr. Bishai's June 9, 2014 report and provide an opinion on the nature and percentage of impairment.

In a June 18, 2015 report, OWCP's medical adviser opined that Dr. Bishai's impairment rating was inconsistent with the findings of Dr. Maiocco, appellant's treating physician. He reiterated that he agreed with Dr. Maiocco's rating.

By decision dated August 19, 2015, OWCP found that the evidence of record was insufficient to establish more than four percent permanent impairment to the right arm. It advised that the weight of the medical evidence was represented by Dr. Maiocco. OWCP found that Dr. Bishai's impairment rating was inconsistent with the medical evidence of record from appellant's treating physician and that OWCP authorized appellant to change her treating physician to Dr. Bishai.

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.⁶ 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.⁷ FECA, however, does not specify the manner by which the percentage loss

⁶ See 20 C.F.R. §§ 1.1-1.4.

⁷ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

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.⁸

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).⁹ 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.¹⁰

ANALYSIS

The issue on appeal is whether appellant established that she sustained more than four percent permanent impairment to the right upper extremity, for which she previously 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.¹¹ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹² 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

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

⁹ 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).

¹⁰ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹² *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

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.¹³

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 August 19, 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.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹³ *Supra* note 11.