United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
	)	**Docket No. 16-0814**
and	)	**Issued: February 22, 2017**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, New York, NY, Employer	)	

Appearances:
Thomas R. Uliase, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 15, 2016 appellant, through counsel, filed a timely appeal from a November 13, 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) 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 met her burden of proof to establish more than three percent permanent impairment of the right arm, for which she previously received a schedule award.

On appeal, counsel contends that the medical opinion of Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon and OWCP referral physician, cannot carry the weight of the medical opinion evidence because he did not reference the July/August 2009 *The Guides Newsletter* to rate impairment of appellant's cervical condition. He further contends that Dr. Draper failed to explain how he calculated his one percent right shoulder impairment rating.

FACTUAL HISTORY

OWCP accepted that on February 18, 2009 appellant, then a 64-year-old workers' compensation claims examiner, sustained a right fracture of the carpal bone, neck sprain, and right shoulder impingement when she slipped in a building lobby at work. She stopped work on the date of injury. On June 29, 2009 appellant returned to full-time limited-duty work with restrictions. The employing establishment terminated her employment, effective July 31, 2009, due to unsatisfactory/unacceptable work performance.

In an October 19, 2009 decision, OWCP terminated appellant's wage-loss compensation for partial disability, effective July 31, 2009. It found that the medical evidence of record established that she would have been able to continue working in her limited-duty position at the employing establishment had she not been terminated for cause. That decision was affirmed on March 15, 2010 by an OWCP hearing representative.

In a March 2, 2011 medical report, Dr. David Weiss, an attending osteopath, found that appellant had 16 percent permanent impairment of the right upper extremity pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). He diagnosed chronic post-traumatic cervical strain and sprain, aggravation of preexisting, age-related, multilevel discogenic disease of the cervical spine, right upper extremity radiculitis, post-traumatic acromioclavicular joint arthropathy with impingement to the right shoulder, status post triquetral fracture to the right wrist, and post-traumatic right carpal tunnel syndrome. Dr. Weiss' impairment rating was based on appellant's right shoulder range of motion deficit, entrapment neuropathy of the right median nerve of the wrist, and right wrist triquetral fracture. He concluded that she had reached maximum medical improvement (MMI) on the date of his examination.

On May 5, 2012 appellant filed a claim for a schedule award (Form CA-7).

On July 10, 2012 Dr. Daniel O. Zimmerman, an OWCP medical adviser who is a Board-certified internist, reviewed the medical evidence, and advised that Dr. Weiss' March 2, 2011 report could not be used to calculate a schedule award as his impairment ratings were based on conditions not accepted by OWCP and he used the range of motion method to rate impairment of appellant's right shoulder.

By letter dated August 22, 2012, OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine her permanent impairment. In a September 14, 2012 medical report, Dr. Smith rated 10 percent permanent impairment of the right arm under the sixth edition of the A.M.A., *Guides*. He concluded that appellant had reached MMI on February 18, 2010, which was one-year post injury.

On September 19, 2012 Dr. Zimmerman reviewed the medical record, including Dr. Smith's findings and agreed that appellant had 10 percent permanent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*. He further found that she had eight percent permanent impairment of the cervical spine and two percent permanent impairment of the right shoulder. Dr. Zimmerman reported no impairment due to a right avulsion triquetral fracture. He agreed with Dr. Smith's finding that appellant had reached MMI on February 18, 2010.

In a November 2, 2012 report, Dr. Weiss found that appellant had 17 percent permanent impairment of the right upper extremity based on the sixth edition of the A.M.A., *Guides*. His impairment rating was based on appellant's right shoulder range of motion deficit, right wrist triquetral fracture, and peripheral nerve root impairment at C5 and C6. Dr. Weiss concluded that she had reached MMI on March 2, 2011, the date of his prior report.

On December 5, 2012 Dr. Zimmerman again reviewed the medical record, including Dr. Weiss' new report and advised that the 10 percent right upper extremity impairment rating remained the same. He noted that he had previously explained why Dr. Weiss' March 2, 2011 report could not be used to process an impairment rating for a schedule award. Dr. Zimmerman found no information in Dr. Weiss' November 2, 2012 report that would require any modification of the right upper extremity impairment rating provided in his September 19, 2012 report. On December 28, 2012 he noted Dr. Smith's impairment evaluation and maintained that Dr. Weiss' report did not suggest that the conditions for which his impairment ratings were considered had changed.

By letter dated January 11, 2013, OWCP referred appellant to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for another second opinion evaluation. In a February 15, 2013 report, Dr. Didizian found that appellant had seven percent permanent impairment of the right upper extremity. He determined that she had reached MMI on the date of his examination.

On March 15, 2013 Dr. Zimmerman reviewed the medical record, including Dr. Didizian's February 15, 2013 report. He agreed with Dr. Didizian's seven percent right upper extremity impairment rating and date of MMI.

On April 1, 2013 OWCP found a conflict in medical opinion between Dr. Weiss, Dr. Smith, and Dr. Didizian regarding the extent of appellant's permanent impairment. By letter dated April 17, 2013, it referred her, together with the case record, a list of questions, and a statement of accepted facts (SOAF), to Dr. Edward B. Krisiloff, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a May 7, 2013 report, Dr. Krisiloff found that appellant had three percent whole person impairment of the cervical spine due to symptomatic degenerative disc disease, two percent

impairment of the right shoulder due to a sprain/strain, and one percent impairment of the right wrist joint. He utilized Table 17-2, Table 15-5, and Table 15-3, pages 564, 401, and 395 of the sixth edition of the A.M.A., *Guides* to rate impairment of her cervical spine, right shoulder, and right wrist, respectively. Dr. Krisiloff determined that appellant had reached MMI on February 18, 2010, one year after her date of injury.

On June 19, 2013 Dr. Morley Slutsky, an OWCP medical adviser who is Board-certified in preventive medicine, reviewed the medical record, including Dr. Krisiloff's report. He advised that he was unable to determine if Dr. Krisiloff correctly applied the A.M.A., *Guides*. Dr. Slutsky recommended that OWCP obtain a supplemental report from Dr. Krisiloff clarifying how he used the A.M.A., *Guides* to calculate his impairment ratings.

In a June 24, 2013 decision, OWCP granted appellant a schedule award for one percent impairment of the right wrist and two percent impairment of the right shoulder, totaling three percent permanent impairment of the right arm based on Dr. Krisiloff's May 7, 2013 report. It paid her compensation for 9.36 weeks from February 18 to April 24, 2010. OWCP stated that additional development of the medical evidence was necessary to determine whether appellant had permanent aggravation of her underlying cervical disc disease based on Dr. Krisiloff's three percent whole impairment rating for symptomatic cervical disc disease.

By letter dated July 1, 2013, appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a September 6, 2013 decision, an OWCP hearing representative set aside the June 24, 2013 decision and remanded the case for OWCP to refer appellant for a new second opinion examination to determine the nature and extent of her right upper extremity impairment. She found that OWCP had improperly found a conflict in medical opinion between Dr. Weiss, Dr. Smith, and Dr. Didizian, finding that Dr. Weiss had not provided a rationalized medical opinion to establish that appellant's right arm and cervical conditions were causally related to the accepted February 18, 2009 employment injuries. The hearing representative further found that Dr. Smith had not provided a rationalized opinion to establish a causal relationship between appellant's cervical condition and the accepted work injuries, Dr. Didizian had not addressed this matter, and there could be no conflict between these physicians because they were both OWCP second opinion physicians. Moreover, she found that Dr. Krisiloff's report did not have special weight as Dr. Slutsky was unable to determine whether he had properly utilized the A.M.A., *Guides* to rate appellant's impairment.

On remand, QTC Medical Services referred appellant to Dr. Draper for a second opinion examination. In a November 19, 2013 report, Dr. Draper reviewed the SOAF and appellant's medical history and examined appellant. He reported range of motion measurements for the cervical spine, right elbow, right forearm, right wrist, right fingers, and right shoulder. Dr. Draper also reported motor function of +5 for the right and left deltoids, biceps, triceps, wrist and finger extensors and flexors and finger grip strength. Reflex function for the brachioradialis, biceps, and triceps was reported as +1 for the right and left. Light touch sensation was normal from the C2 to T1 dermatomes. A compression test was negative with a tilt to the right and left. The right hand had no thenar or hypothenar atrophy. Light touch sensation was normal at the tip

of the index finger and little finger. A Phalen's sign was negative. The right shoulder had negative a Yergason's sign, impingement test, and Hawkins' sign.

Dr. Draper diagnosed degenerative cervical disc disease at multiple levels without cervical radiculopathy, right shoulder impingement syndrome, right carpal bone fracture (healed dorsal triquetral avulsion-type fracture), and right carpal tunnel syndrome. Utilizing the diagnosis-based impairment rating method, under Table 15-5 of the A.M.A., *Guides*, he found that appellant's right shoulder impingement syndrome represented a class 1 impairment, grade C default value which yielded one percent impairment. Dr. Draper assigned grade modifiers 1 for GMFH, GMPE, and GMCS. He applied the net adjustment formula and concluded that appellant had one percent right arm impairment due to her shoulder condition. Utilizing Table 15-2, page 396, Dr. Draper classified her right carpal triquetral avulsion fracture as a class 1 impairment. He assigned grade modifiers 1 for GMFH, GMPE, and GMCS. Dr. Draper applied the net adjustment formula and found that appellant had three percent right arm impairment for this condition. Utilizing Table 15-23, page 449, he assigned grade modifiers 1 for GMFH, GMPE, and GMCS due to appellant's right carpal tunnel syndrome. Dr. Draper applied the net adjustment formula and found that she had two percent right arm impairment. He added these impairment ratings to calculate five percent arm impairment attributable to the right wrist. Dr. Draper then added the one percent impairment for the right shoulder and five percent for the right wrist to yield six percent permanent impairment of the right upper extremity. He advised that his clinical examination did not reveal any specific findings consistent with a cervical radiculopathy and, thus, concluded that there was no additional impairment due to this condition.

On November 29, 2013 Dr. Zimmerman reviewed Dr. Draper's report and disagreed with his right wrist impairment ratings. He noted that OWCP had not accepted appellant's claim for carpal tunnel syndrome or wrist fracture. Dr. Zimmerman noted that a triquetral fracture was a carpal bone, not a wrist bone. He maintained that Dr. Draper's impairment ratings for the right wrist fracture and right carpal tunnel syndrome were not usable for schedule award purposes as the medical documentation did not address how these conditions were due to or a consequence of the accepted February 18, 2009 employment injuries. Dr. Zimmerman noted that Dr. Draper's one percent right shoulder impairment rating was less than the two percent impairment already processed, and, thus it had no impact. He related that his finding of no cervical impairment also had no impact. Dr. Zimmerman concluded that Dr. Draper's report did not establish greater right upper extremity impairment.

In a January 15, 2014 decision, OWCP found that the weight of the medical evidence rested with the opinions of Drs. Draper and Zimmerman and concluded that appellant was not entitled to a schedule award greater than that which was previously awarded for the right upper extremity.

By letter dated January 30, 2014, counsel requested an oral hearing before an OWCP hearing representative, which was held on June 12, 2014.

In an August 29, 2014 decision, an OWCP hearing representative set aside the January 15, 2014 decision and remanded the case for OWCP to obtain clarification from Dr. Draper as to whether appellant's cervical degenerative disc disease was caused or aggravated by the accepted February 18, 2009 employment injuries. She also requested that it obtain

clarification from Dr. Zimmerman regarding whether he understood that his eight percent cervical impairment rating had not been awarded and an opinion from him on the extent of appellant's impairment based on the accepted conditions.

On October 22, 2014 Dr. Draper reviewed a SOAF that superseded all prior SOAFs. In response to OWCP's question, he opined that there was a temporary aggravation of appellant's degenerative cervical disc disease and multilevel spondylotic ridge bulging disc complexes at C3-4, C4-5, C-6, and C6-7 without focal herniation. Careful review of a magnetic resonance imaging (MRI) scan showed no structural changes that were traumatically induced or the result of trauma. Consequently, Dr. Draper determined that there was no structural change that was traumatically induced with respect to the cervical disc pathology. He concluded that there was no evidence of permanent aggravation of the preexisting degenerative cervical disc disease and cervical spondylotic ridge with bulging disc complexes. Dr. Draper noted that a temporary aggravation would last two to four months from February 18, 2009, the date of injury. He found no evidence of permanent aggravation of preexisting cervical conditions during his November 19, 2013 examination. Dr. Draper related that the conclusions in that report remained the same.

By decision dated January 20, 2015, OWCP found that appellant had no permanent impairment of the cervical spine based on Dr. Draper's October 22, 2014 report.

In a letter dated January 27, 2015, counsel requested an oral hearing before an OWCP hearing representative, which was held on August 28, 2015.

By decision dated November 13, 2015, an OWCP hearing representative affirmed the January 20, 2015 decision. She found that the weight of the medical evidence rested with the opinion of Dr. Draper and concluded that appellant was not entitled to a schedule award greater than that which was previously awarded for the right upper extremity or a schedule award for impairment to the cervical spine.

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.[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 American

[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).

Medical Association, *Guides to the Evaluation of Permanent Impairment* 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 met her burden of proof to establish more than three percent impairment of the right arm, 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 diagnosis-based impairment 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 diagnosis-based impairment 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 diagnosis-based impairment methodology. Because OWCP's own physicians are inconsistent

[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).

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

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

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 November 13, 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 November 13, 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 22, 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

[10] *Supra* note 8.