

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

L.D., Appellant)
and) Docket No. 15-1311
U.S. POSTAL SERVICE, PROCESSING &) Issued: July 21, 2017
DISTRIBUTION CENTER, Cleveland, OH,)
Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

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

JURISDICTION

On May 26, 2015 appellant, through counsel, filed a timely appeal from a March 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.³

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.*

³ The record provided to the Board includes medical evidence received after OWCP issued its March 19, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant has established more than five percent permanent impairment of her right upper extremity for which she previously received a schedule award.

FACTUAL HISTORY

On January 18, 2012 appellant, then a 49-year-old mail processing clerk, injured her right upper extremity in the performance of duty.⁴ OWCP accepted her traumatic injury claim for right shoulder sprain and right shoulder impingement syndrome.⁵ On September 27, 2012 appellant underwent right shoulder acromioplasty, which OWCP authorized. She received wage-loss compensation for temporary total disability. In June 2013, appellant returned to work in a full-time, limited-duty capacity. She continued to work limited duty until October 2013 when she stopped due to a left shoulder condition.⁶

On November 6, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a report dated November 18, 2013, Dr. Jeffrey C. Kirschman, Board-certified in occupational medicine, found that appellant had 15 percent right upper extremity impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides* 2009). Dr. Kirschman, using the range of motion (ROM) impairment rating method, rated appellant under Table 15-34, A.M.A., *Guides* 475.⁷

In a May 6, 2014 report, Dr. Morley Slutsky, OWCP's district medical adviser (DMA), found that, using the diagnosis-based impairment (DBI) methodology, appellant had five percent right upper extremity permanent impairment.⁸ The DMA rated appellant under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402. He based his impairment rating on a diagnosis of partial thickness rotator cuff tear. The DMA explained that the DBI method was the "preferred" method under the sixth edition, rather than the ROM method utilized by appellant's physician. He also questioned the reliability of Dr. Kirschman's shoulder ROM measurements. Consequently, the DMA found 5 percent right upper extremity permanent impairment in comparison to Dr. Kirschman's 15 percent permanent impairment rating.

⁴ Appellant reported having "felt a pop" while casing mail.

⁵ Since the May 2015 filing of the current appeal, OWCP has expanded appellant's claim to include right shoulder algoneurodystrophy as an accepted condition.

⁶ Appellant ultimately retired on disability effective August 8, 2014.

⁷ Dr. Kirschman found 3 percent upper extremity permanent impairment for loss of flexion (120°), 2 percent for loss of extension (10°), 6 percent for loss of abduction (80°), 1 percent for loss of adduction (10°), 4 percent for loss of internal rotation (10°), and 0 percent for loss of external rotation (80°), for a total of 15 percent right upper extremity impairment.

⁸ Dr. Slutsky authored a similar report on January 18, 2014.

By decision dated May 23, 2014, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity. The award covered a period of 15.6 weeks from November 18, 2013 through March 7, 2014.

Counsel timely requested a hearing, which was held on January 14, 2015.

In a March 19, 2015 decision, the hearing representative affirmed OWCP's May 23, 2014 schedule award. He found that the DMA's five percent right upper extremity impairment rating represented the weight of the medical evidence of record.

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.⁹ 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.¹⁰ 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.¹¹

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).¹² The Board has approved OWCP's use 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.¹³

⁹ See 20 C.F.R. §§ 1.1-1.4.

¹⁰ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

¹¹ 20 C.F.R. § 10.404; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹² See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹³ *Isidoro Rivera*, 12 ECAB 348 (1961).

ANALYSIS

The issue on appeal is whether appellant has established more than five percent permanent impairment of her 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 had been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹⁴ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁵ In *T.H.*, the Board concluded that OWCP physicians were 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 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 found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.¹⁶

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the March 19, 2015 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly, and after 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.

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

¹⁵ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁶ *Supra note 15.*

ORDER

IT IS HEREBY ORDERED THAT the March 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: July 21, 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