United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 16-1669**
	)	**Issued: March 22, 2017**
U.S. POSTAL SERVICE, SOUTH TROOST STATION, Kansas City, MO, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 18, 2016 appellant, through counsel, filed a timely appeal from a March 14, 2016 merit decision and an August 10, 2016 nonmerit 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.*

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish more than seven percent permanent impairment of the right arm and five percent permanent impairment of the left arm, for which she previously received schedule awards; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On appeal counsel generally asserts that OWCP improperly denied an additional schedule award.

FACTUAL HISTORY

On December 13, 2011 appellant, then a 50-year-old city letter carrier, filed a traumatic injury claim (Form CA-1), alleging that on September 20, 2011 she injured her right arm while picking up a tub of flats. OWCP initially accepted sprain of the shoulder and upper arm, supraspinatus, right, and later expanded the claim to include right upper extremity conditions of sprain of superior glenoid labrum lesion, complete rotator cuff rupture, and ankyloses of shoulder joint, and left upper extremity conditions of impingement syndrome and rotator cuff sprain on the left.

Dr. John A. Gillen, II, a Board-certified orthopedic surgeon, performed right shoulder operative procedures on March 22 and June 25, 2012, and procedures on the left on October 3, 2013, and January 21, 2014. Appellant received wage-loss compensation for surgical recovery and for attendance at medical treatment appointments. She returned to modified duty on October 3, 2014.

In a report dated June 18, 2014, Dr. Gillen advised that he began treating appellant in February 2012. He described her treatment thereafter and advised that, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] appellant had 48 percent right shoulder permanent impairment and 29 percent left shoulder permanent impairment.

In September 2014 OWCP referred appellant to Dr. Kala Danushkodi, a Board-certified physiatrist, for an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*.[4] In a September 30, 2014 report, Dr. Danushkodi advised that, under Table 15-5 of the sixth edition, Shoulder Regional Grid, appellant had seven percent upper extremity permanent impairment on the right, and five percent upper extremity permanent impairment on the left based on the diagnosis-based impairment (DBI) methodology for diagnosis of full-thickness rotator cuff tear. Dr. Daniel D. Zimmerman, a Board-certified orthopedic surgeon and an OWCP medical adviser, concurred with Dr. Danushkodi's impairment analysis.

[3] A.M.A., *Guides* (5th ed. 2001).

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

By decision dated November 3, 2014, OWCP granted appellant a schedule award for seven percent permanent impairment of the right shoulder and five percent permanent impairment of the left shoulder. Appellant timely requested a hearing with OWCP's Branch of Hearings and Review.[5] She retired on Office of Personnel Management disability, effective January 13, 2015.

At the hearing, held before an OWCP hearing representative on June 17, 2015, appellant described her employment and medical histories. Counsel maintained that appellant had preexisting carpal tunnel syndrome that should have been considered in the impairment analysis and that, at a minimum, a conflict in medical evidence had been created between the opinions of Dr. Gillen and Dr. Danushkodi.

Following the hearing, appellant submitted a July 17, 2015 report in which Dr. Robert P. Poetz, an osteopath, described her work and medical history, and complaints of neck and bilateral, radiating shoulder pain. Upper extremity examination included decreased shoulder range of motion (ROM) and positive Phalen's and Tinel's signs at the wrists bilaterally. Dr. Poetz diagnosed right shoulder rotator cuff tear, subacromial impingement, anterior and posterior glenoid labral tears, partial tear of the biceps tendon, subclavicular impingement, and adhesive capsulitis; left shoulder rotator cuff tear, subacromial impingement, partial tears of biceps tendon, mild glenohumeral osteoarthritis, and adhesive capsulitis; and bilateral carpal tunnel syndrome. He evaluated impairment in accordance with the sixth edition of the A.M.A., *Guides*, noting that for decreased right and left shoulder ROM, under section 15.7g, appellant had 23 percent impairment bilaterally which, after adding modifiers, yielded 24 percent permanent impairment of each upper extremity under the ROM methodology. For the diagnosis of carpal tunnel syndrome, Dr. Poetz utilized Table 15-3, wrist regional grid. He found that appellant had one percent permanent impairment of each upper extremity due to carpal tunnel syndrome. Dr. Poetz combined the bilateral 1 percent impairment for carpal tunnel syndrome with the 24 percent for loss of shoulder motion, and concluded that appellant had 25 percent permanent impairment of each upper extremity.

By decision dated August 11, 2015, an OWCP hearing representative remanded the case to OWCP for referral of Dr. Poetz's report to an OWCP medical adviser for review regarding appellant's bilateral upper extremity impairment, to be followed by a *de novo* decision.

Dr. Zimmerman, OWCP's medical adviser, reviewed Dr. Poetz's report on September 7, 2015. He indicated that Dr. Poetz's shoulder impairment ratings were not acceptable because they were not in compliance with the requirements of the A.M.A., *Guides*. The medical adviser further noted that, as carpal tunnel syndrome had not been accepted, it need not be rated. He concluded that Dr. Poetz's report provided no medically acceptable basis upon which to revise appellant's previous schedule award.

In a September 25, 2015 decision, OWCP found that appellant had not established entitlement to permanent impairment greater than that previously received.

[5] Thomas R. Uliase, Esq., began representing appellant in December 2014.

Appellant, through counsel, timely requested a hearing. At the hearing on February 8, 2016, counsel maintained that the September 7, 2015 report by Dr. Zimmerman was insufficient because he had not applied the A.M.A., *Guides* to Dr. Poetz's findings. He further asserted that, as carpal tunnel syndrome was preexisting, it should have been considered.

By decision dated March 14, 2016, an OWCP hearing representative found that OWCP properly accorded weight to the opinions of Dr. Danushkodi and Dr. Zimmerman and affirmed the September 25, 2015 decision. He noted that the medical record did not establish preexisting carpal tunnel syndrome.

On June 28, 2016 appellant, through counsel, requested reconsideration of the March 14, 2016 decision. He submitted a May 18, 2016 report in which Dr. Poetz asserted that he properly interpreted the A.M.A., *Guides* in finding loss of bilateral upper extremity motion.

In a decision dated August 10, 2016, OWCP denied appellant's request for reconsideration of the merits.

LEGAL PRECEDENT -- ISSUE 1

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.[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 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.,

[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).

[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 2.808.5a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[10]

ANALYSIS -- ISSUE 1

The issue on appeal is whether appellant met her burden of proof to establish that she has more than seven percent permanent impairment of the right upper extremity and five percent permanent impairment of the left upper extremity for which she previously received schedule awards on November 3, 2014. The accepted right upper extremity conditions are, sprain of shoulder and upper arm, supraspinatus, right, sprain of superior glenoid labrum lesion, complete rotator cuff rupture, and ankyloses of shoulder joint. Accepted left upper extremity conditions are impingement syndrome and rotator cuff sprain.

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 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 March 4, 2016 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,

[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).

[13] *Supra* note 11.

OWCP shall issue a *de novo* decision on appellant's claim for an additional right upper extremity schedule award.

In light of the Board's disposition regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: March 22, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board