United States Department of Labor
Employees' Compensation Appeals Board

T.A., Appellant	)	
and	)	**Docket No. 16-1809**
	)	**Issued: March 28, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Louisville, KY, Employer	)	

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 13, 2016 appellant, through counsel, filed a timely appeal from a June 6, 2016 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 to consider the merits of the 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 established that he has more than six percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

On appeal counsel contends that appellant has 10 percent permanent impairment of his left upper extremity.

FACTUAL HISTORY

On January 28, 2014 appellant, then a 53-year-old automobile technician, filed a traumatic injury claim (Form CA-1) alleging that on January 9, 2014 he felt something pull or sprain in his left shoulder while he was attempting to loosen a tight bolt. OWCP accepted appellant's claim for sprain of the left shoulder, upper arm, and rotator cuff, other affections of left shoulder region, and rupture of long head biceps tendon.

On June 18, 2014 Dr. Daniel Rueff, appellant's treating Board-certified orthopedic surgeon, performed a left shoulder arthroscopic biceps tendon debridement, left shoulder arthroscopic labral debridement, and left shoulder arthroscopic subacromial decompression. In a November 1, 2014 report, he noted that appellant's physical examination revealed forward flexion to 150 degrees, external rotation to 50 degrees, and full range of motion (ROM) of appellant's elbow, wrist, and hand. Dr. Rueff noted that appellant still had some weakness with abduction.

On February 6, 2015 appellant filed a claim for a schedule award (Form CA-7).

On March 3, 2015 OWCP referred appellant to Dr. Anbu K. Nadar, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 4, 2015 report, Dr. Nadar diagnosed tear and degenerative changes involving the biceps tendon, and noted that appellant had surgery with arthroscopic debridement of the biceps tendon and subacromial decompression. He then applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (6th ed. 2009) (hereinafter A.M.A., *Guides*), to determine appellant's permanent impairment. Dr. Nadar applied Table 15-5 of the A.M.A., *Guides* and noted that, using the diagnosis-based impairment (DBI) methodology of rating impairment, appellant fell under class 1 which had a mid-range default value of five percent. He noted a grade modifier of 2 for functional history and a grade modifier of 1 for physical examination which resulted in a numerical adjustment of +1, and a move from grade C to D, which resulted in a left upper extremity permanent impairment rating of six percent.[3]

On June 9, 2014 OWCP referred the case to an OWCP medical adviser. In a June 9, 2015 note, the medical adviser agreed with Dr. Nadar's calculations and found that appellant was entitled to a schedule award for six percent permanent impairment of his left upper extremity based on Table 15-5 of the A.M.A., *Guides.*

[3] A.M.A., *Guides* 404, Table 15-5.

On June 16, 2015 OWCP issued a schedule award for six percent permanent impairment of appellant's left upper extremity.

On July 10, 2015 appellant, through counsel, made a timely request for a telephonic hearing before an OWCP hearing representative.

A hearing was held on March 21, 2016, at which time counsel for appellant argued that permanent impairment was a medical issue, that the claimant did not have the opportunity to be examined by a physician of his own choosing before the schedule award was issued, that appellant had since been examined, and that a report was forthcoming. Counsel asked that the new report be sent to OWCP's medical adviser for review. The hearing representative agreed to hold the record open for 30 days for submission of additional evidence.

In a March 4, 2016 report, Dr. Martin Fritzhand, a Board-certified urologist, noted on physical examination that appellant had tenderness over the posterior aspect of the left shoulder and crepitus on both active and passive movement. He noted that appellant's shoulder pain had persisted since surgery, that muscle strength was somewhat diminished over the left shoulder muscle groups, and that there was sensory loss involving the left upper limb. Dr. Fritzhand also noted that appellant's ROM was markedly decreased. In order to determine appellant's permanent impairment, he noted Table 15-5 of the A.M.A., *Guides* with regard to sprain/strain. Dr. Fritzhand further noted that if motion loss was present then appellant's impairment could alternatively be assessed using the ROM methodology under section 15.7.[4] He noted that an ROM impairment rating stands alone and is not combined with a DBI rating. Dr. Fritzhand used Table 15-34 to assess impairment.[5] He noted impairment ratings as follows: flexion of three percent; extension of one percent, abduction of three percent, adduction of one percent, internal rotation two percent, and external rotation zero percent. Dr. Fritzhand concluded that appellant therefore sustained 10 percent permanent impairment of his left upper extremity.

OWCP referred appellant's case to OWCP's medical adviser to review the medical evidence and to rate appellant's permanent impairment. In a March 31, 2016 response, the medical adviser indicated that based on the A.M.A., *Guides*, appellant's claim could be calculated either on the basis of impingement under Table 15-5 with a default value of three percent and a maximum of five percent impairment or it could be calculated for labral tear that was debrided utilizing Table 15-5, which also yielded a default value of three percent and a maximum of five percent impairment. He opined that Dr. Fritzhand incorrectly utilized the A.M.A., *Guides* because he based his calculation on the ROM methodology rather than the DBI methodology. The medical adviser indicated that this was inconsistent with section 15.2 of the A.M.A., *Guides*, which provided that ROM was used primarily as a physical examination adjustment factor and only to determine actual impairment values in the case where it was not possible to otherwise define impairments.[6] He indicated that in this case it was possible to determine a DBI rating so utilizing the ROM rating was unnecessary.

[4] *Id.* at 472.

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

[6] *Id.* at 387.

After rejecting Dr. Fritzhand's report, OWCP's medical adviser applied Table 15-5 for labral tear class 1, default value of three percent. Using the adjustment grid and grade modifiers, he found a grade modifier of two for functional history due to pain with normal activity, a physical examination adjustment of two for moderate decrease in ROM, and a clinical study adjustment of two, for SLAP tear or other labral lesions. Utilizing the net adjustment formula, the medical adviser determined that the net adjustment was +2, which moved the value to grade E and yielded five percent impairment. He concluded that as appellant had already been awarded six percent permanent impairment for the left upper extremity, he was not entitled to an additional award.

By decision dated June 6, 2016, the hearing representative affirmed the June 16, 2015 decision.

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.[7] 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.[8] 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.[9]

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).[10] The Board has approved the use by OWCP of the A.M.A.,

[7] *See* 20 C.F.R. §§ 1.1-1.4.

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

[9] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[11]

ANALYSIS

The issue is whether appellant has more than six percent permanent impairment of his left upper extremity, for which he previously received a schedule award. The Board finds this case is not in posture for decision.

Dr. Fritzhand, appellant's physician, reported that appellant had 10 percent permanent impairment of his left upper extremity utilizing the ROM rating protocols. OWCP's district medical adviser reviewed Dr. Fritzhand's report and related that appellant's permanent impairment should not be rated based on loss of ROM, but rather based on the DBI method. Previously, OWCP's second opinion physician, Dr. Nadar, had also used the DBI method to rate appellant's permanent impairment. Both Dr. Nadar and OWCP's district medical adviser concluded that appellant had six percent permanent impairment of his left upper extremity.

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.[12] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[13] 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.[14]

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 6, 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

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

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

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

[14] *Supra* note 12.

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 decision of the Office of Workers' Compensation Programs dated June 6, 2016 is set aside, and the case is remanded for further action consistent with this decision.

Issued: March 28, 2017
Washington, DC

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

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

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