United States Department of Labor
Employees' Compensation Appeals Board

G.Y., Appellant	)	
and	)	**Docket No. 16-1879**
	)	**Issued: March 27, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Youngstown, OH, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 22, 2016 appellant, through counsel, filed a timely appeal from an August 1, 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 over the merits of this case.

ISSUE

The issue is whether appellant has more than one percent permanent impairment of each upper extremity for which he 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 23, 2013 appellant, then a 47-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he experienced bilateral shoulder pain after lifting a package. OWCP accepted the claim for bilateral shoulder sprains and bilateral shoulder impingement and paid compensation for disability beginning July 27, 2013. Appellant returned to his usual employment on January 13, 2014.

On December 22, 2014 appellant filed a claim for a schedule award (Form CA-7). By letter dated January 12, 2015, OWCP requested that he submit an impairment evaluation from his attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In an impairment evaluation dated March 4, 2015, Dr. Catherine Watkins-Campbell, Board-certified in family practice, discussed appellant's history of an injury to his shoulders at work on May 23, 2013. She diagnosed a shoulder and upper arm sprain and affections of the shoulder region, not otherwise classified. Dr. Watkins-Campbell measured range of motion (ROM) for the shoulders bilaterally three times. For the right shoulder, she measured 155, 160, and 155 degrees flexion, 66, 67, and 68 degrees extension, 60, 65, and 67 degrees internal rotation, 84, 78, and 80 degrees external rotation, 150, 145, and 140 degrees abduction, and 37, 36, and 36 degrees adduction. For the left shoulder, Dr. Watkins-Campbell measured 150, 150, and 157 degrees flexion, 78, 72, and 74 degrees extension, 60, 62, and 68 degrees internal rotation, 70, 76, and 76 degrees external rotation, 145, 140, and 140 degrees abduction, and 25, 28, and 30 degrees adduction. On examination of the shoulders, she found normal sensation, no tenderness, negative signs of impingement, no instability, a negative Yergason's test, and normal reflexes. Dr. Watkins-Campbell identified the ratable diagnosis as class 1 impingement syndrome using Table 15-5 on page 402 of the A.M.A., *Guides*. She found that the ROM methodology should be used to rate appellant's impairment instead of the diagnosis-based impairment (DBI) method.

Dr. Watkins-Campbell averaged the ROM measurements and found that, for the right shoulder, 157 degrees flexion yielded 3 percent impairment, 66 degrees extension, 36 degrees adduction, and 81 degrees external rotation yielded no impairment, 145 degrees abduction yielded 3 percent impairment, and 64 degrees internal rotation yielded 2 percent impairment, for a total permanent impairment due to reduced right upper extremity motion of 8 percent. She averaged ROM measurements for the left shoulder and found 152 degrees of flexion yielded 3 percent impairment, 75 degrees extension and 74 degrees external rotation yielded no impairment, 142 degrees abduction yielded 3 percent impairment, 28 degrees adduction yielded 1 percent impairment, and 63 degrees internal rotation yielded 2 percent impairment, for a total left upper extremity permanent impairment due to motion loss of 9 percent. Dr. Watkins-Campbell advised that appellant had a *Quick*DASH (Disabilities of the Arm, Shoulder, and Hand) score of 14, which yielded a grade modifier of zero for functional history. She applied a grade modifier of one for physical examination for mild motion loss of the shoulders. Dr. Watkins-Campbell concluded that appellant had eight percent permanent impairment of the right upper extremity and nine percent permanent impairment of the left upper extremity.

Dr. Morley Slutsky, a physician Board-certified in occupational medicine and an OWCP medical adviser, reviewed the evidence on May 17, 2015. He noted that appellant had no current symptoms of impingement syndrome. Dr. Slutsky advised that Dr. Watkins-Campbell did not use the DBI impairment rating methodology, the preferred method under the A.M.A., *Guides*. He also noted that she averaged the ROM measurements to determine the impairment rather than using the maximum observed measurements as required by the A.M.A., *Guides*. Dr. Slutsky identified the diagnosis as a class 1 shoulder strain under Table 15-5 on page 401 of the A.M.A., *Guides*. He applied a grade modifier of zero for functional history as appellant could perform self-care activities, a grade modifier of zero for clinical studies, and a grade modifier of one for physical examination for some motion loss. Utilizing the net adjustment formula, Dr. Slutsky found a net adjustment of negative one and one percent permanent impairment of each upper extremity.

OWCP, in a letter dated June 3, 2015, requested that Dr. Watkins-Campbell review the opinion of Dr. Slutsky and opine whether she concurred or disagreed with his permanent impairment rating. It advised that the ROM methodology should only be used if there was no other way to rate the impairment.

Dr. Watkins-Campbell, in an addendum dated June 11, 2015, indicated that she used the diagnosis of other affections of the shoulder not otherwise classified in rating appellant's permanent impairment. She related:

> "In this case, the other affections of the shoulder as noted in the medical records reviewed involved bilateral impingement from hypertrophy of the subacromial bursa and tendinosis. The injections administered significantly resolved the symptoms but not completely. With impingement that has not been treated with surgery, the symptoms are likely to reoccur again at some point. [Appellant's] *Quick*DASH score was low at 14. Functionally, as long as he is not raising his arm repeatedly which would aggravate impingement or perpetuate impingement symptoms, he functions without a lot of problems."

Dr. Watkins-Campbell disagreed with OWCP's medical adviser's finding that appellant's sprain was his "most impairing diagnosis." She noted that the A.M.A., *Guides* allowed use of ROM methodology and advised that he did not "fit well into the classes assigned for impingement syndrome."

On July 3, 2015 Dr. Slutsky again opined that appellant had one percent permanent impairment of each upper extremity. He explained that his rating differed from that of Dr. Watkins-Campbell as he used the DBI impairment rating methodology. Dr. Slutsky noted that appellant had no impingement syndrome symptoms at the time of Dr. Watkins-Campbell's evaluation. Dr. Slutsky reiterated that Dr. Watkins-Campbell's ROM measurements were not valid as she used the average measurements rather than the maximum value obtained. He asserted that the A.M.A., *Guides* indicated that ROM was used primarily as an adjustment factor and should only be used as a stand-alone rating method there was no other method available. Dr. Slutsky again identified the diagnosis as a bilateral strain and, after applying the same grade modifiers, found one percent permanent impairment of each arm.

By decision dated September 17, 2015, OWCP granted appellant a schedule award for one percent permanent impairment of each upper extremity.[3] The period of the award ran for 6.24 weeks from January 15 to February 27, 2015.

Counsel on September 25, 2015 requested a telephone hearing. At the telephone hearing held on May 17, 2016 he maintained that OWCP sent schedule awards to Dr. Slutsky, an out of district physician, because he always found a lower percentage of permanent impairment. Counsel asserted that Dr. Watkins-Campbell rebutted OWCP's medical adviser's opinion and questioned why the medical adviser who created the dispute resolved it in his favor. He maintained that a conflict existed between Dr. Watkins-Campbell and the medical adviser.

In a decision dated August 1, 2016, OWCP's hearing representative affirmed the September 17, 2015 decision. She found that the opinion of the medical adviser was reasoned and consistent with the A.M.A., *Guides*. The hearing representative further noted that Dr. Watkins-Campbell found no objective evidence of impingement syndrome and failed to explain how appellant's current symptoms differed from symptoms of a strain.

On appeal counsel contends that Dr. Slutsky is not an impartial physician.

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.[4] 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.[5] 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.[6]

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

[3] OWCP determined that a conflict existed between Dr. Watkins-Campbell and the medical adviser regarding the extent of appellant's permanent impairment of the upper extremities. It referred him for an impartial medical examination. On August 27, 2015 OWCP advised appellant that it had cancelled his appointment with the referral physician.

[4] *See* 20 C.F.R. §§ 1.1-1.4.

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

[6] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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).[7] 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.[8]

ANALYSIS

The issue on appeal is whether appellant has more than one percent permanent impairment of each upper extremity for which he 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.[9] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[10] 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.[11]

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 1, 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

[7] *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).

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

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

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

[11] *Supra* note 9.

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 1, 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 27, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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