United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 16-1189**
	)	**Issued: May 4, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Portland, OR, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 13, 2016 appellant, through counsel, filed a timely appeal from an April 4, 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 established a permanent impairment of her right upper extremity due to her work-related injuries sufficient to warrant 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 June 16, 2011 appellant, then a 39-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that same date she sustained a broken right wrist and right forearm when she was struck by a tow motor. OWCP accepted the claim for closed fracture of lower end of the right radius; closed fracture of upper end of the right ulna; closed fracture of shaft radius and right ulna; and right shoulder adhesive capsulitis. Appellant stopped work on the date of injury and received wage-loss compensation. She returned to work on December 5, 2011 in a part-time limited-duty capacity.

By letter dated December 23, 2014, Dr. Hoang Nguyen, Board-certified in internal medicine, reported that appellant had reached maximum medical improvement (MMI).

On January 26, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated February 9, 2015, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).[3] It provided her 30 days to submit the requested evidence.

In support of her claim, appellant submitted a February 19, 2015 impairment evaluation from Dr. Thomas L. Gritzka, a Board-certified orthopedic surgeon. Dr. Gritzka provided a detailed medical history and findings on physical examination. He reported findings regarding the right shoulder of 4/5 motor strength and intact sensation, negative Tinel's test, positive Phalen's test, no right shoulder crepitus, negative apprehension and adduction tests, and negative impingement sign. Range of motion (ROM) was 120 degrees right shoulder extension, 120 degrees right elbow extension, right wrist 35 degrees flexion, 45 degrees extension, 20 degrees ulnar deviation, and 10 degrees radial deviation; and right thumb 45 degrees abduction. Dr. Gritzka reported that the most accurate way to rate appellant's impairment was as a stand-alone entity using the ROM method. Utilizing the sixth edition of the A.M.A., *Guides* at Table 15-30 (thumb ROM),[4] Table 15-33 (elbow/forearm ROM),[5] and Table 15-11 (impairment values calculated from upper extremity impairment),[6] he opined that appellant sustained a combined 26 percent permanent impairment of the right upper extremity referable to loss of ROM in the shoulder, elbow, wrist, and thumb.

On April 9, 2015 OWCP routed Dr. Gritzka's report, a statement of accepted facts (SOAF), and the case file to Dr. Kenneth D. Sawyer, a Board-certified surgeon serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained a permanent impairment of the right upper extremity and the date of MMI.

[3] A.M.A., *Guides* (2009).

[4] *Id.* at 468.

[5] *Id.* at 474.

[6] *Id.* at 420.

In an April 14, 2015 report, Dr. Sawyer reported that Dr. Gritzka had found a combined 26 percent impairment of the upper right extremity based on loss of right shoulder, elbow, and wrist motion, as well as decreased right thumb motion not previously identified. He disagreed with Dr. Gritzka's findings and noted that the physician used the ROM rating methodology instead of the "preferred" diagnosis-based impairment (DBI) method also contained in the A.M.A., *Guides*. Dr. Sawyer noted that Dr. Gritzka had not reported his motion measurements rounded to the nearest 10 degrees as required by the A.M.A., *Guides* which would change the rating to 23 percent permanent impairment of the right upper extremity.[7] He further noted that Dr. Gritzka had not provided complete ROM loss findings as required under the A.M.A., *Guides*, including a report of multiple (at least three) measurements and a comparison of active to passive motion.[8] Dr. Sawyer noted that appellant's prior examinations revealed greater ROM than the findings provided by Dr. Gritzka and varied significantly from 2011 through 2015. The DMA noted that where active movement varies between examiners, the measurements should be deemed invalid due to variation of the evidence.[9] He concluded that Dr. Gritzka had failed to determine MMI and suggested a new rating examination by a different examiner.

By letter dated June 1, 2015, OWCP provided Dr. Gritzka a copy of Dr. Sawyer's April 14, 2015 report and the SOAF for review requesting that he respond to the concerns presented by the DMA within 30 days. No further evidence was received.

By decision dated July 6, 2015, OWCP denied appellant's claim for a schedule award finding that the medical evidence failed to establish that her condition had reached a fixed and permanent state.

On July 13, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In support of her claim, appellant submitted a June 10, 2015 supplemental report from Dr. Gritzka following his review of Dr. Sawyer's assessment. Dr. Gritzka reported that he had performed three ROM measurements and noted that, if three measurements of a specific range were close (within six percent of each other), the lowest ROM or that which would give the greatest impairment should be used. He explained that appellant's motion, when assessed repetitively, deteriorated and thus he used the lowest of the three measurements. Dr. Gritzka explained that the measurements he reported did not differ greatly from those reported by the other physicians of record. He opined that appellant reached MMI in December 2011 when she returned to work with restrictions. Dr. Gritzka argued that Dr. Sawyer had provided a similar impairment rating at 23 percent verses his 26 percent impairment of the upper right extremity. He noted that he was essentially on the same page with Dr. Sawyer and that a reasonable approach would be to split the difference and assign appellant a 24.5 percent impairment of the upper right extremity. Dr. Gritzka concluded that his 26 percent impairment rating was based on his measurements, including repetitive measurements of the same motion and comparison of

[7] *Id.* at section 15.7a, page 461.

[8] *Id.*

[9] *Id.* at 425.

active and passive ROM, while acknowledging that the same individual may have slightly different impairments based on physical examination from day to day.

At the February 29, 2016 hearing, counsel for appellant testified that appellant's prior examinations which, revealed varying ROM measurements, were of no probative value as the reports were stale. Counsel argued that Dr. Gritzka's June 10, 2015 report provided the appropriate rationale for her right upper extremity impairment.

By decision dated April 4, 2016, OWCP's hearing representative denied modification of the July 6, 2015 decision finding the evidence insufficient to establish any permanent impairment to a member or function of the body. He found that appellant's treating physicians had not properly evaluated using the preferred DBI method. Therefore, the hearing representative concluded that the weight of the medical evidence rested with Dr. Sawyer, serving as OWCP's DMA, who properly evaluated her permanent impairment under the DBI method utilizing the A.M.A., *Guides*.

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.[10] 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.[11] 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 A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[12]

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

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[10] *See* 20 C.F.R. §§ 1.1-1.4.

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

[12] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak,* 53 ECAB 130 (2001).

[13] *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).

Guides for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[14]

ANALYSIS

OWCP accepted appellant's claim for closed fracture of the lower end of the right radius, closed fracture of the upper end of the right ulna, closed fracture of the shaft radius and right ulna, and right shoulder adhesive capsulitis. The issue is whether appellant sustained any permanent impairment to a scheduled member. 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.[15] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[16] 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.[17]

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

CONCLUSION

The Board finds that this case is not in posture for a decision.

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

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

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

[17] *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: May 4, 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