United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
	)	**Docket Nos. 16-1621 &**
and	)	**16-1622**
	)	**Issued: May 12, 2017**
DEPARTMENT OF JUSTICE, U.S. MARSHALS SERVICE, Montgomery, AL, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 9, 2016 appellant, through counsel, filed timely appeals from two merit decisions of the Office of Workers' Compensation Programs (OWCP). One appeal was from an April 22, 2016 merit decision under OWCP File No. xxxxxx275, assigned Docket No. 16-1621 and the other appeal was from a May 5, 2016 merit decision under OWCP File No. xxxxxx825, assigned Docket No. 16-1622. 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.*

ISSUE -- OWCP FILE NO. xxxxxx275

The issue is whether appellant met his burden of proof to establish ratable permanent impairment of his right fifth finger, warranting a schedule award.

On appeal, counsel contends that OWCP's April 22, 2016 decision is contrary to fact and law.

FACTUAL HISTORY – OWCP FILE NO. xxxxxx275

On December 22, 2003 appellant, then a 44-year-old criminal investigator/deputy marshal, filed a traumatic injury claim (Form CA-1) assigned File No. xxxxxx275 alleging that on that date he sustained right hand and little finger injuries when a shelf fell while he was arranging ammunition boxes in a weapons vault. He heard a ripping sound and experienced immediate swelling of his right little finger as it was pulled away from his right hand.

A hospital report dated December 22, 2003 bearing an unknown signature from a medical provider who indicated a history of injury that on that date appellant sustained a right little finger injury when a box of ammunition fell on his right hand. The report noted a diagnosis of sprain of the right fifth finger metacarpophalangeal (MCP) radiating with pain.

On June 9, 2015 appellant filed a claim for a schedule award (Form CA-7). No new evidence was submitted along with the claim.

On June 25, 2015 OWCP accepted appellant's claim for sprain of the right fifth finger. In a letter of the same date, it advised him of the deficiencies of his schedule award claim and requested that he submit a medical report from his treating physician establishing that the accepted condition had attained maximum medical improvement (MMI), and providing an impairment rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, the A.M.A., *Guides*).[3]

In a July 17, 2015 medical report, Dr. Lawrence T. Williams, an attending family practitioner and internist, noted that he had examined appellant on February 8, 2015. He indicated that appellant related a history of injury that he had a painful right fifth finger condition and diagnosed a strain. Dr. Williams related that apparently appellant had a tear of the ligature in his hand that caused the finger to be in an attitude of adduction with weakness. He maintained that appellant apparently tore this ligature while moving ammunition boxes from shelving that fell and caused his injury. Dr. Williams advised that it seemed appellant had reached MMI and concluded that at most he had five percent permanent impairment.

By decision dated July 28, 2015, OWCP denied appellant's schedule award claim. It found that he did not submit any medical evidence in response to its June 25, 2015 development letter.

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

On July 31, 2015 appellant requested a telephone hearing with an OWCP hearing representative, which was held on March 8, 2016.

During the March 8, 2016 telephone hearing, appellant described his December 22, 2003 employment injury, current symptoms, and medical treatment. Dr. Williams testified that he had reviewed his medical records, which indicated that appellant had a right hand injury with separation of the small finger into a permanent abduction with weakness in the right small finger. He reiterated his opinion that appellant sustained a tear in his hand and right small finger when ammunition boxes fell off a shelf. Dr. Williams related that he could not determine the extent of his permanent impairment at the time of the hearing. The hearing representative requested that he provide an impairment rating based on the A.M.A., *Guides*.

Following the March 8, 2016 hearing, OWCP received copies from appellant of pages from the sixth edition of the A.M.A., *Guides*, which included Table 15-2, Digital Regional Grid,[4] Table 15-9 regarding clinical studies adjustments for upper extremities,[5] and Table 15-10, Methodology for Determining the Grade in an Impairment Class.[6]

In an April 22, 2016 decision, an OWCP hearing representative affirmed the July 28, 2015 decision. He found that Dr. Williams' July 17, 2015 impairment rating of five percent was speculative. The hearing representative also found that he did not provide objective findings in accordance with the sixth edition of the A.M.A., *Guides* to support his impairment rating.

ISSUE -- OWCP FILE NO. xxxxxx825

The issue is whether appellant met his burden of proof to establish ratable permanent impairment of his left elbow, warranting a schedule award.

On appeal, counsel contends that OWCP's May 5, 2016 decision is contrary to fact and law.

FACTUAL HISTORY -- OWCP FILE NO. xxxxxx825

On July 31, 2007 appellant filed a (Form CA-1) assigned File No. xxxxxx825 alleging that on July 20, 2007 he sustained a left elbow injury when he struck it twice on a billiard table in a living room.

In reports dated October 5, 17, and 23, 2007, Dr. George D. Walcott, Jr., a Board-certified orthopedic surgeon, and Dr. Williams noted a history that on July 20, 2007 appellant was involved in an altercation while arresting a fugitive. Appellant struck his left olecranon on the floor or pool table. The physicians examined appellant, diagnosed left olecranon bursitis, and recommended surgery. Dr. Walcott opined that the diagnosed condition was caused by the July 20, 2007 incident.

[4] *Id*. at 394.

[5] *Id*. at 410.

[6] *Id*. at 412.

On November 2, 2007 OWCP accepted appellant's claim for left olecranon bursitis. It authorized a left olecranon bursectomy performed by Dr. Walcott on November 8, 2007.[7]

In a January 7, 2008 report, Dr. Walcott examined appellant's left elbow. He reported full range of motion of the elbow. There was no drainage, redness, or tenderness. Appellant had a little bit of swelling that looked like normal postoperative swelling. Dr. Walcott provided an impression of left olecranon bursitis two months status post bursectomy with some initial drainage in the postoperative period now resolved after oral antibiotics. Based on his examination findings, he released appellant to full duty with no restrictions. Dr. Walcott advised that appellant had no permanent impairment. He concluded that appellant had reached MMI as of the date of his examination.

On June 9, 2015 appellant filed a Form CA-7 claim for a schedule award. No new evidence was submitted along with the claim.

By letter dated June 22, 2015, OWCP advised appellant of the deficiencies of his claim and requested a medical report from his treating physician assessing his permanent impairment based on the sixth edition of the, A.M.A., *Guides* and establishing that he had reached MMI.

In a July 17, 2015 report, Dr. Williams noted that he had examined appellant on July 8, 2015. He also noted that appellant sustained left olecranon bursitis as a result of his July 20, 2007 work injury. Dr. Williams reviewed appellant's medical treatment and advised that he had reached MMI on April 7, 2008, approximately 18 months after his work injury. He reported that appellant still had pain in his left elbow and pain with full extension of the elbow. Dr. Williams also reported that appellant had no preexisting condition of pain or impairment of the left elbow prior to his injury. He concluded that appellant had 10 percent permanent impairment of his left elbow based on his subjective pain experience with the use of the elbow.

By decision dated July 28, 2015, OWCP denied appellant's schedule award claim. It found that he did not submit any medical evidence in response to its June 22, 2015 development letter.

On July 31, 2015 appellant requested a telephone hearing with an OWCP hearing representative, which was held on March 8, 2016.[8]

During the March 8, 2016 telephone hearing, appellant testified that he hurt his right elbow and experienced pain subsequent to his employment-related left elbow injury. Dr. Williams testified that appellant had swelling and pain in his bursa. He noted that he would have to examine appellant and utilize the sixth edition of the A.M.A., *Guides* to determine the extent of impairment to his left elbow.

Following the March 8, 2016 hearing, OWCP received an undated report from Dr. Williams, in which he reiterated findings and his diagnosis of left olecranon bursitis from his

[7] Appellant returned to work on November 19, 2007.

[8] The Board notes that the March 8, 2016 telephone hearing was held separately from the previous telephone held on the same date in appellant's claim assigned File No. xxxxxx275.

July 17, 2015 report. Dr. Williams noted that he had no medical records regarding appellant's claim of impairment to his right elbow. He found a class 1 diagnosis-based impairment (DBI) Class of Diagnosis (CDX) for left olecranon bursitis. Dr. Williams assigned a grade modifier 2 for Functional History (GMFH), grade modifier 2 for Physical Examination (GMPE), and grade modifier 1 for Clinical Studies (GMCS). He applied the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), or (2-1) + (2-1) + (1-1), which yielded a grade adjustment of 2, resulting in a grade E impairment.

In an April 2, 2016 report, Dr. Williams again noted a history of the accepted July 20, 2007 left elbow injury, appellant's medical treatment, and diagnosis of left olecranon bursitis. He also noted that appellant was retired. Dr. Williams reported that his functional history included residual pain, scarring, and an ability to move his elbow appropriately with some pain and weakness. On physical examination he found a six-centimeter scar from the left olecranon process. Dr. Williams reported that clinical studies revealed that appellant required surgical removal of his bursa with shaving of the olecranon bony traumatic growth. Referring to Table 15-4, page 398 of the sixth edition of the A.M.A., *Guides*, he again found a class 1 DBI for the diagnosis of left olecranon bursitis. Dr. Williams again assessed grade modifiers 2 for GMFH and GMPE and grade modifier 1 for GMCS, which yielded a grade E or three percent whole person impairment. He noted that the calculated total whole person impairment was 47 percent.

In a May 5, 2016 decision, the prior OWCP hearing representative affirmed the July 28, 2015 decision. He found that Dr. Williams' reports did not provide objective findings in accordance with the sixth edition of the A.M.A., *Guides* to support his left elbow impairment ratings, particularly in light of Dr. Walcott's January 7, 2008 opinion that appellant had no permanent impairment.

LEGAL PRECEDENT -- OWCP FILE NO. xxxxxx275 and xxxxxx825

The schedule award provision of FECA[9] and its implementing federal regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions and organs of the body. 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[10] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[11] For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.[12]

[9] 5 U.S.C. § 8107.

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

[11] *K.H.*, Docket No. 09-341 (issued December 30, 2011).

[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).

The A.M.A., *Guides* provide a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health. For lower extremity impairments, the evaluator identifies the impairment class for the diagnosed condition CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[14] Evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[15]

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member as a result of any employment injury.[16] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates the date on which this date occurred (date of MMI), describe the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[17]

ANALYSIS -- OWCP FILE NO. xxxxxx275

OWCP accepted that appellant sustained a right fifth finger sprain on December 22, 2003 while in the performance of duty in his claim assigned File No. xxxxxx275. In decisions dated July 28, 2015 and April 22, 2016, it denied his claim for a schedule award.

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award for his accepted right fifth finger condition.

In a July 17, 2015 report, Dr. Williams, an attending physician, found that it "seemed" that appellant had reached MMI and at most he had five percent impairment. His opinion on the issue of whether appellant had reached MMI is speculative in nature.[18] Moreover, Dr. Williams did not cite to any Tables or pages in the sixth edition of the A.M.A., *Guides* to support his rating or otherwise explain his determination.[19] The Board notes that he opined that appellant had "apparently" torn the ligature in his right hand due to the accepted employment injury. Dr. Williams' diagnosis is speculative in nature.[20] Further, the Board notes that OWCP has not accepted torn ligament of the right hand as employment related. For conditions not accepted by

[13] *Supra* note 4 at 493-531.

[14] *Id.* at 521.

[15] *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[16] *A.A.*, Docket No. 16-41 (issued February 11, 2016); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[17] *Supra* note 13 at Chapter 2.808.5 (February 2013).

[18] Medical opinions that are speculative or equivocal in character are of little probative value. *See Kathy A. Kelley*, 55 ECAB 206 (2004).

[19] *See Mary L. Henninger*, 52 ECAB 408 (2001).

[20] *Supra* note 19.

OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.[21] Dr. Williams did not provide any medical rationale explaining how appellant's torn ligament of the right hand was caused or aggravated by the accepted December 22, 2003 employment injury. The Board has held that a medical opinion not fortified by rationale is of diminished probative value.[22]

Appellant submitted copies of pages from the sixth edition of the A.M.A., *Guides*, which discussed the process for rating impairment of a digit and upper extremities. This evidence does not provide a physician's medical opinion regarding whether appellant had reached MMI and whether he had any permanent impairment of his right finger due to his accepted employment injury under the sixth edition of the A.M.A., *Guides*.

As stated, it is appellant's burden of proof to establish that he sustained permanent impairment of a scheduled member as a result of an employment injury.[23] He did not submit such evidence and thus, he did not meet his burden of proof in his claim assigned File No. xxxxxx275.[24]

On appeal, counsel contends that OWCP's April 22, 2016 decision is contrary to fact and law. For the reasons stated above, the Board finds that counsel's contentions are not substantiated.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

ANALYSIS -- OWCP FILE NO. xxxxxx825

The Board notes that under File No. xxxxxx825, OWCP accepted appellant's claim for left olecranon bursitis due to a July 20, 2007 employment-related injury. In decisions dated July 28, 2015 and May 5, 2016, it denied his claim for a schedule award.

The Board finds that the case is not in posture for decision regarding appellant's left elbow impairment.

Appellant submitted medical reports dated July 17, 2015 and April 2, 2016 and an undated report from Dr. Williams. In the July 17, 2015 report, Dr. Williams found that appellant sustained left olecranon bursitis as a result of the July 20, 2007 work injury, reached MMI on April 7, 2008, and had 10 percent permanent impairment of the left elbow. In the April 2, 2016

[21] *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

[22] *Cecilia M. Corley*, 56 ECAB 662 (2005).

[23] *See* cases cited *supra* note 17.

[24] *L.F.*, Docket No. 10-0343 (issued November 29, 2010); *V.W.*, Docket No. 09-2026 (issued February 16, 2010).

and undated reports, he reiterated his prior diagnosis of work-related left olecranon bursitis and that appellant had reached MMI as of April 7, 2008. He applied relevant tables of the sixth edition of the A.M.A., *Guides* and determined that appellant had three percent whole person impairment of the left upper extremity. Dr. Williams noted that the calculated total whole person impairment was 47 percent.

While Dr. Williams offered different impairment ratings of the left elbow, OWCP may rely on the opinion of an OWCP district medical adviser (DMA) to apply the A.M.A., *Guides* to the findings reported by the attending physician.[25] OWCP procedures provide that in a claim for a schedule award, if the medical evidence indicates MMI has been reached and describes the permanent partial impairment of the affected member in accordance with the current edition of the A.M.A., *Guides*, the case should be referred to the DMA for review.[26] In this case, however, it did not refer Dr. Williams' July 17, 2015, April 2, 2016, and undated reports to a DMA for review of a permanent impairment. In his May 5, 2016 decision, an OWCP hearing representative found that his medical reports did not provide any objective findings and concluded that the medical evidence did not establish permanent impairment of the left elbow. The hearing representative, however, made a medical determination without the benefit of medical advice or review by OWCP's DMA that appellant's injury did not cause or contribute to any permanent impairment of the left elbow.[27] OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the DMA for an opinion concerning the nature and percentage of any impairment in accordance with the A.M.A., *Guides*.[28] However, OWCP did not forward this medical evidence to the DMA for review.

Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[29] Despite having submitted medical evidence in support of his schedule award claim, OWCP failed to develop the evidence as appellant's case record was not referred to a DMA for review for a determination on whether MMI had been reached and the percentage of permanent partial impairment of the left elbow.[30]

For these reasons, the May 5, 2016 decision will be set aside and the case remanded to OWCP for review of the medical record by OWCP's DMA. If the DMA is unable to render a reasoned opinion fully explaining the application of the A.M.A., *Guides*, OWCP shall refer appellant to an appropriate Board-certified specialist for a second opinion regarding the extent of

[25] *See Linda Beale*, 57 ECAB 429 (2006).

[26] *Supra* note 13 at Chapter 2.810.8(i) (September 2010).

[27] *J.C.*, Docket No. 13-0195 (issued April 3, 2013).

[28] *See supra* note 13 at Chapter 2.808.6(f) (February 2013).

[29] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *William J. Cantrell*, 34 ECAB 1233 (1993); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[30] *Supra* note 27; *J.G.*, Docket No. 09-1714 (issued April 7, 2010).

his left elbow extremity impairment.[31] Following such development as OWCP deems necessary, it shall issue a *de novo* decision on appellant's schedule award claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish ratable permanent impairment of his right fifth finger, entitling him to a schedule award under File No. xxxxxx275. The Board further finds, however, that the case is not in posture for decision as to whether appellant has ratable permanent impairment of his left elbow, entitling him to a schedule award under File No. xxxxxx825.

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with the decision of the Board. The April 22, 2016 decision of OWCP is affirmed.

Issued: May 12, 2017
Washington, DC

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

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

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

[31] If the medical evidence does not contain the required elements for a schedule award impairment calculation, the claims examiner should request such information from the attending physician prior to a DMA review. If the attending physician does not submit the requested information, the claims examiner should obtain the evidence through a second opinion evaluation prior to a DMA review. *Supra* note 27.