

**United States Department of Labor
Employees' Compensation Appeals Board**

C.S., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DELIVERY CENTER, Macon, GA, Employer)

**Docket No. 17-0502
Issued: May 22, 2017**

Appearances:

*Anthony Arenas, for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 9, 2017 appellant, through her representative, filed a timely appeal from a December 2, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has established more than two percent permanent impairment of her left upper extremity, for which she has 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.*

On appeal appellant, through counsel, contends that OWCP cannot pick and choose which parts of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009) that it wishes to use. Counsel contends that the A.M.A., *Guides* still allow for the range of motion (ROM) method to be used for calculating an impairment rating. He also contends that the A.M.A., *Guides*, provide that if there is more than one method to rate a particular impairment or condition, the method producing the higher rating must be used.

FACTUAL HISTORY

On April 14, 2013 appellant, then a 51-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she suffered a left shoulder strain as a result of her federal employment. In an accompanying statement, she alleged that she injured her left shoulder while lifting and using the delivery bar code sorter. Appellant did not initially stop work.

On March 28, 2014 OWCP accepted appellant's claim for left shoulder impingement syndrome.

On May 2, 2014 Dr. Jeffrey A. Fried, a Board-certified orthopedic surgeon, performed an arthroscopic lysis of adhesions and an arthroscopic subacromial decompression. His postoperative diagnosis was impingement syndrome, left shoulder, and subacromial spur and adhesive capsulitis, left shoulder.

Appellant received compensation benefits on the supplemental rolls from May 3, 2014.

On May 5, 2014 OWCP expanded appellant's claim to include acceptance for partial tear of the left rotator cuff.

In a January 21, 2015 report, Dr. Fried diagnosed appellant with impingement syndrome of her left shoulder, rotator cuff syndrome not otherwise specified, and lateral epicondylitis. He stated that she had two percent permanent impairment of the upper extremity pursuant to the A.M.A., *Guides*.

On February 18, 2015 OWCP referred appellant's case to OWCP's medical adviser for an impairment rating. In a response dated February 24, 2015, the medical adviser indicated that he agreed with Dr. Fried. He explained that, using the diagnosis-based impairment (DBI) method, pursuant to Table 15-5 on page 401 of the A.M.A., *Guides*, appellant had a class 1, grade C soft tissue injury to her left shoulder causing pain which equaled two percent permanent impairment of her left upper extremity.

On February 28, 2015 appellant filed a claim for a schedule award (Form CA-7).

On February 26, 2015 OWCP issued a schedule award for two percent permanent impairment of appellant's left upper extremity.

On March 9, 2015 appellant requested an oral hearing before an OWCP hearing representative, which was held on October 6, 2015.

By decision dated December 15, 2015, the hearing representative affirmed the February 26, 2015 schedule award decision, noting that there was no evidence that appellant had greater than two percent permanent impairment of the left upper extremity.

On April 27, 2016 appellant filed a claim for an increased schedule award. In support thereof, she submitted an October 13, 2015 impairment rating by Dr. Samy F. Bishai, an orthopedic surgeon. Dr. Bishai diagnosed internal derangement of the left shoulder, rotator cuff tear and syndrome left shoulder joint, left shoulder impingement syndrome, and status postoperative arthroscopic surgery for treatment of rotator cuff tear and shoulder impingement left shoulder. He used the stand alone ROM method to calculate her impairment under Table 15-34 of the A.M.A., *Guides*.³ Dr. Bishai noted that with regard to appellant's left shoulder, flexion was 80 degrees which equaled nine percent upper extremity permanent impairment. Extension of 20 degrees equaled two percent upper extremity permanent impairment. Dr. Bishai further noted that abduction of 80 degrees equaled six percent upper extremity permanent impairment, and adduction of 20 degrees equaled one percent upper extremity impairment. He noted internal rotation was 20 degrees which equaled four percent upper extremity impairment and external rotation of 45 degrees equaled two percent upper extremity permanent impairment. Dr. Bishai explained that adding these impairment ratings, "since we are dealing with one and the same joint)," totaled 24 percent permanent impairment of the left upper extremity.

On May 10, 2016 OWCP referred the record to its medical adviser for an impairment rating. In a May 14, 2016 response, OWCP's medical adviser suggested that Dr. Bishai's rating should be disregarded. He noted that Dr. Bishai based his rating on ROM, and that the A.M.A., *Guides* indicated that ROM is to be used primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairment. The medical adviser concluded that appellant had already been granted a schedule award for two percent permanent impairment of her left upper extremity, and that was the appropriate award.

In a June 8, 2016 report, Dr. Bishai responded to OWCP's medical adviser's report. He noted that the medical adviser relied upon the opinion of Dr. Fried for his impairment rating, and that the medical adviser had not examined appellant. Dr. Bishai also opined that Dr. Fried's use of the diagnosis-based impairment (DBI) method was not credible since it did not take into consideration the marked reduction of appellant's ROM. Dr. Bishai also raised questions with regard to the date of maximum medical improvement.

In a November 15, 2016 response, OWCP's medical adviser reviewed Dr. Bishai's comments, but concluded that given that there was a DBI for appellant's condition (rotator cuff syndrome which corresponded to tendinitis as noted in Table 15-5), it was clear that the DBI method was appropriate. The medical adviser again noted that the DBI method was preferable under the sixth edition of the A.M.A., *Guides*.

By decision dated December 2, 2016, OWCP denied appellant's claim for an additional schedule award, finding that the weight of the medical evidence rested with the opinion of OWCP's medical adviser.

³ A.M.A., *Guides* 475, Table 15-34.

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 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 is whether appellant has more than two percent permanent impairment of her left upper extremity, for which she has previously received a schedule award.

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

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).

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).

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 December 2, 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 this case not in posture for decision.

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

¹¹ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 2, 2016 is set aside, and the case is remanded for further action consistent with this decision.

Issued: May 22, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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