United States Department of Labor
Employees' Compensation Appeals Board

B.R., Appellant	)	
and	)	**Docket No. 17-1243**
	)	**Issued: November 6, 2017**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, DAYTON INTERNATIONAL AIRPORT, Vandalia, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 16, 2017 appellant, through counsel, filed a timely appeal from a March 13, 2017 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 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 more than one percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On May 5, 2007 appellant, then a 40-year-old transportation security screener, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment, including repetitively lifting luggage and heavy "wanding," caused an injury to his right arm. He did not stop work, but was placed on limited duty. OWCP accepted appellant's claim for right elbow and forearm strain, and the acceptance of the claim was later expanded to include right lateral epicondylitis.[3]

On August 23, 2007 appellant filed a claim for recurrence of disability (Form CA-2a) alleging that, while on limited duty on August 19, 2007, a passenger handed him a box to be screened, that the box was not labeled as heavy, and that as he lifted the box he immediately felt forearm muscle and elbow strain in the same area he had hurt before. OWCP considered his claim as a claim for new traumatic injury.[4] On September 28, 2007 it accepted this claim for aggravation of a right forearm strain and right elbow strain. Appellant received intermittent wage-loss compensation on the supplemental rolls commencing December 7, 2007.

OWCP again expanded acceptance of the claim to include a lesion of the right radial nerve and a May 29, 2008 right radial tunnel release surgery. Appellant missed time from work on an intermittent basis until May 30, 2008, when he stopped work due to his May 29, 2008 right radial tunnel release surgery. He returned to full-time, limited-duty work on June 30, 2008. Appellant continued working in that capacity until November 20, 2011, at which time the employing establishment determined his restrictions could no longer be accommodated. He received wage-loss compensation on the periodic rolls commencing January 15, 2012.

OWCP referred appellant to vocational rehabilitation services, which resulted in placement as a security guard at the Great-Wolf Lodge in Mason, OH beginning July 2, 2014. By decision dated March 3, 2015, OWCP found that appellant's actual wages as a security guard represented his wage-earning capacity, and reduced his compensation benefits effective July 2, 2014.

By letter received on November 21, 2014, appellant, through counsel, filed a claim for a schedule award. In a report dated November 5, 2014, Dr. Martin Fritzhand, appellant's Board-certified preventive medicine physician, listed appellant's accepted conditions as sprain of right elbow and forearm, unspecified site, right lateral epicondylitis, and right lesion of radial nerve. He noted that appellant's right elbow was normal. Dr. Fritzhand noted no tenderness on palpation of the right epicondyle. He noted a 13 centimeter longitudinal surgical scar over the radial aspect of the right forearm commencing 2 centimeters below the antecubital fossa, which

[3] File No. xxxxxx111.

[4] OWCP assigned File No. xxxxxx337.

was tender to palpation. Dr. Fritzhand noted muscle strength was well-preserved over the right elbow flexors and extensors, and that there was no evidence of muscle atrophy. He noted pinprick and light touch were diminished over the radial aspect of the right forearm.

Dr. Fritzhand utilized Table 15-23 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*) to assess impairment. He noted that appellant's test findings resulted in grade modifier of 0, history grade modifier of 2, and physical examination grade modifier of 2. Dr. Fritzhand added these together to equal 4 and then divided by 3 to equal 1.33, which he rounded down to 1, therefore, he found that the grade modifier of 1 represented the final rating class. He noted that appellant's *Quick*DASH was 66, but that as this value was substantially higher than the rating category, it was not used for rating. Dr. Fritzhand assigned the default value, and indicated that appellant had sustained a permanent impairment of the right upper extremity of two percent.

On August 29, 2007 OWCP referred appellant's case to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as OWCP's medical adviser, for a calculation of permanent impairment of appellant's right upper extremity. In a report dated September 27, 2015, Dr. Slutsky noted that appellant had both a negative right elbow magnetic resonance imaging (MRI) scan and a negative electromyogram/nerve conduction velocity (EMG/NCV) test regarding radial nerve involvement at the right elbow. On May 29, 2008 the right elbow area was diagnosed with right radial tunnel syndrome and the claimant underwent right radial tunnel release, entire radial tunnel. As appellant did not have EMG/NCV testing which met the criteria as set forth in the A.M.A., *Guides*, Dr. Slutsky determined that the use of Table 15-23 for compression neuropathy was inapplicable, and appellant could only be rated for nonspecific right elbow pain. Accordingly, Dr. Slutsky applied the calculations as set forth in Table 15-4 of the A.M.A., *Guides*. He noted that the diagnosis-based impairment (DBI) method was the preferred rating method and would be used for final impairment calculations. Dr. Slutsky placed appellant in class 1 for the most impairing diagnosis in the elbow region for nonspecific pain. He noted that although Dr. Fritzhand found a grade modifier of 2 for functional history, he disagreed. Dr. Slutsky noted that Dr. Fritzhand gave appellant a *Quick*DASH score of 66 percent, which equaled a grade modifier of 3, which was 2 grade modifiers higher than the clinical studies modifier, and therefore the grade modifier for functional history was unreliable. He noted that he agreed with Dr. Fritzhand the grade modifier for physical examination was 2, noting decreased sensation to light touch and pinprick. Dr. Slutsky also agreed with Dr. Fritzhand that appellant had a grade modifier of 0 for clinical studies, noting negative EMG/NCV testing and a negative MRI scan for radial nerve involvement. The Class of Diagnosis (CDX) was 1, the Functional History (GMFH) modifier was unreliable, the Physical Examination (GMPE) was 2, and the Clinical Studies (GMCS) grade modifier was 0. Using the net adjustment formula, (GMPE–CDX) + (GMCS–CDX), or (2-1) + (0-1), he found the net adjustment was 0, and that appellant had a permanent impairment of his right upper extremity of 1 percent.

By letter dated March 3, 2016, OWCP asked Dr. Fritzhand to comment on Dr. Slutsky's report, and afforded him 30 days to submit a response. Dr. Fritzhand did not respond.

By decision dated May 17, 2016, OWCP issued a schedule award for one percent permanent impairment of the right upper extremity.

By letter from counsel received by OWCP on May 31, 2016, appellant requested a telephonic hearing before an OWCP hearing representative.

At the hearing held on January 12, 2017, counsel asked that OWCP review appellant's case in light of the Board's decision in *T.H.*,[5] with regard to schedule awards for upper extremity impairments. He argued that Dr. Slutsky utilized outdated A.M.A., *Guides,* and that Dr. Slutsky's reports had been criticized. Counsel further contended that in *T.H,* the Board had found Dr. Slutsky unreliable and that a consistent method for rating upper extremity impairment was required to ensure consistent results.

By decision dated March 13, 2017, OWCP's hearing representative affirmed the May 17, 2016 decision, finding that the weight of the medical evidence rested with the opinion of Dr. Slutsky. She rejected counsel's argument that the Board's decision in *T.H.* required a different result, noting that the issue in that case discussed the use of DBI impairment method *versus* the range of motion (ROM) method, which was not the issue in the instant case as neither physician used the ROM method to reach an impairment rating.

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.[6] 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.[7] 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.[8]

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.

[5] Docket No. 14-0943 (issued November 25, 2016).

[6] *See* 20 C.F.R. §§ 1.1-1.4.

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

[8] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak,* 53 ECAB 130 (2001).

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[9] 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.[10]

ANALYSIS

The issue is whether appellant has more than one percent permanent impairment of his right upper extremity, for which he previously received a schedule award. The March 13, 2017 schedule award was based upon the one percent permanent impairment rating of Dr. Slutsky. In his September 27, 2015 report, Dr. Slutsky relied upon Table 15-4 of the A.M.A., *Guides* using the DBI rating method for the diagnosed condition of elbow region nonspecific pain. The Board finds that this diagnosis as listed in Table 15-4 is one with an asterisk which alternatively allows for consideration of the ROM method of assigning permanent impairment.

The Board finds 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.[11] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[12] In *T.H.*, the Board concluded that OWCP physicians were 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 observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians had shown inconsistency in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[13]

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the March 13, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly,

[9] *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).

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

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

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

[13] *Supra* note 11.

and after 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.[14]

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 March 13, 2017 is set aside, and the case is remanded for further action consistent with this decision.

Issued: November 6, 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

[14] FECA Bulletin No. 17-06 (issued May 8, 2017).