

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

M.R., Appellant)	
)	
and)	Docket No. 17-1114
)	Issued: October 2, 2017
U.S. POSTAL SERVICE, POST OFFICE,)	
Cleveland Heights, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 1, 2017 appellant, through counsel, filed a timely appeal from a February 27, 2017 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 over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish more than 10 percent permanent impairment of her right upper extremity, for which she previously received schedule awards.

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 December 26, 2007 appellant, then a 47-year-old sales service associate, filed an occupational disease claim (Form CA-2) alleging an occupational disease of her right arm due to performing her repetitive work duties over time.³ She did not stop work at the time she filed her claim, but she began working in a limited-duty position for the employing establishment in March 2008. After development of the evidence, OWCP accepted appellant's claim for right lateral epicondylitis and tenosynovitis of her right wrist. She received disability compensation on the daily roll beginning August 27, 2008 for lost time from work due to periodic medical appointments.

On September 1, 2011 appellant filed a traumatic injury claim (Form CA-1) alleging that on September 1, 2011 she sustained injury due to a fall at work.⁴ She stopped work on September 1, 2011 and returned to limited-duty work for the employing establishment on September 6, 2011. OWCP accepted that appellant sustained a lumbosacral joint/ligament sprain, back contusion, lumbago, right hip and thigh sprains (unspecified), and right shoulder and upper arm (coracoclavicular) sprains due to her September 1, 2011 fall. Appellant received disability compensation on the daily roll beginning October 24, 2011 for lost time from work due to periodic medical appointments related to the September 1, 2011 injury

On August 4, 2014 appellant filed a claim for compensation (Form CA-7) claiming a schedule award due to the conditions accepted in connection with her occupational disease claim (File No. xxxxxx477) and, on the same date, she filed another Form CA-7 claiming a schedule award due to the conditions accepted in connection with her September 1, 2011 traumatic injury claim (File No. xxxxxx861).

In a September 30, 2014 decision issued in connection with the occupational disease claim (File No. xxxxxx477), OWCP denied appellant's schedule award claim because no medical evidence had been received to establish entitlement to a schedule award.⁵

Appellant disagreed with the September 30, 2014 decision and, through counsel, she requested a hearing with a representative of OWCP's Branch of Hearings and Review. Prior to a hearing being held, she submitted an October 2, 2014 report from Dr. Catherine E. Watkins Campbell, Board-certified in occupational medicine and family practice. In this report, Dr. Watkins Campbell reported the findings of her August 12, 2014 physical examination and determined that appellant had two percent permanent impairment of her right upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). Dr. Watkins Campbell

³ OWCP assigned the claim the file number of xxxxxx477. Appellant indicated that she first became aware of the claimed condition on December 13, 2007 and first realized on December 20, 2007 that it was caused or aggravated by her employment.

⁴ OWCP assigned the claim File No. xxxxxx861 and doubled this file with the file for appellant's occupational disease claim (File No. xxxxxx477). It assigned File No. xxxxxx477 as the master file and File No. xxxxxx861 as the subsidiary file.

⁵ Despite the fact that appellant's occupational disease and traumatic injury claim files had been doubled, OWCP continued to issue separate decisions under the file number for the occupational disease claim and the file number for the traumatic injury claim.

applied the diagnosis-based impairment (DBI) rating method under Table 15-4 (Elbow Regional Grid) beginning on page 398 and found that appellant's right lateral epicondylitis fell under a class 1 default value of one percent permanent impairment of the right upper extremity due to a history of painful injury with residuals symptoms. She found that appellant had a functional history grade modifier of 2 and a physical examination grade modifier of 1, and that the clinical studies grade modifier was not applicable because there were no applicable clinical studies in the case record. Dr. Watkins Campbell applied the net adjustment formula and found that the result required movement one space to the right of the default value on Table 15-4, such that appellant had two percent permanent impairment of the right upper extremity due to her right lateral epicondylitis. She found that, under Table 15-3 (Wrist Regional Grid) beginning on page 395, appellant's right radial styloid tenosynovitis fell under class 0 and did not qualify her for a right upper extremity permanent impairment rating. Dr. Watkins Campbell concluded that appellant had a total right upper extremity permanent impairment of two percent.

Prior to a hearing being held, OWCP's hearing representative set aside OWCP's September 30, 2014 decision and remanded the case to OWCP for consideration of Dr. Watkins Campbell's October 2, 2014 report. On remand Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, determined in a May 16, 2015 report that, under the DBI rating method of Table 15-4 of the sixth edition of the A.M.A., *Guides*, appellant had one percent permanent impairment of her right upper extremity due to her class 1 right lateral epicondylitis condition. The difference in the degree of permanent impairment from Dr. Watkins Campbell's October 2, 2014 evaluation was due to the fact that Dr. Slutsky determined that appellant had a clinical studies grade modifier of 0, in contrast to Dr. Watkins Campbell's determination that the clinical studies grade modifier was not applicable. Dr. Slutsky indicated that appellant reached maximum medical improvement (MMI) on August 12, 2014.

In a June 3, 2015 decision issued in connection with appellant's occupational disease claim (File No. xxxxxx477), OWCP granted appellant a schedule award for one percent permanent impairment of her right upper extremity. The award ran for 3.12 weeks and was based on Dr. Slutsky's May 16, 2015 impairment rating, which evaluated the examination findings obtained by Dr. Watkins Campbell on August 12, 2014 and described in her October 2, 2014 report.

Appellant disagreed with OWCP's June 3, 2015 one percent right upper extremity schedule award and requested a hearing before a representative of the Branch of Hearings and Review. Prior to a hearing being held, OWCP's hearing representative issued an April 27, 2016 decision setting aside OWCP's June 3, 2015 decision and remanding the case to OWCP for further development. She indicated that the issue at hand was whether Table 15-9 (Clinical Studies Adjustment: Upper Extremities) of the sixth edition of the A.M.A., *Guides* was applicable to the facts of the case. The representative noted that on remand OWCP's medical adviser should be asked to clarify how the x-ray testing of record affected the evaluation of the clinical studies grade modifier under Table 15-9

On remand Dr. Slutsky indicated in a May 8, 2016 report that the x-ray testing of record did not show the accepted condition of right lateral epicondylitis and, therefore, a clinical studies grade modifier of 0 was warranted under Table 15-9. He concluded that appellant had one percent permanent impairment of her right upper extremity under the standards of the sixth edition of the A.M.A., *Guides*.

In a May 26, 2016 decision issued in connection with the occupational disease claim (File No. xxxxxx477), OWCP found that appellant had not established more than one percent permanent impairment of her right upper extremity. In reaching this determination, it relied on the May 8, 2016 report of Dr. Slutsky.

In connection with the traumatic injury claim (File No. xxxxxx861), OWCP requested that Dr. Slutsky serve as an OWCP medical adviser and evaluate the permanent impairment of appellant's right upper extremity. In a September 3, 2016 report, Dr. Slutsky indicated that he had evaluated the October 6, 2014 examination findings of Dr. Watkins Campbell. He applied the range of motion (ROM) methodology for evaluating right upper extremity permanent impairment under Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides* and concluded that appellant had nine percent permanent impairment of her right upper extremity due to restricted right shoulder ROM.⁶ Dr. Slutsky indicated that appellant reached MMI on October 6, 2014.

In an October 26, 2016 decision issued in connection with the traumatic injury claim (File No. xxxxxx861), OWCP granted appellant a schedule award for nine percent permanent impairment of her right upper extremity. The award ran for 28.08 weeks and was based on Dr. Slutsky's September 3, 2016 impairment rating, which evaluated the October 6, 2014 examination findings of Dr. Watkins Campbell. Given that appellant previously received a schedule award for one percent permanent impairment of her right upper extremity in connection with her occupational disease claim (File No. xxxxxx477), she now had received compensation for a total 10 percent permanent impairment of her right upper extremity.

Appellant disagreed with OWCP's May 26, 2016 decision and, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.⁷ In a February 27, 2017 decision issued in connection with the occupational disease claim (File No. xxxxxx477), OWCP's hearing representative affirmed OWCP's May 26, 2016 decision, finding that appellant had one percent permanent impairment of her right upper extremity under the sixth edition of the A.M.A., *Guides*. In her decision, she did not acknowledge OWCP's October 26, 2016 decision granting appellant an additional schedule award for nine percent permanent impairment of her right upper extremity.

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.⁸ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of

⁶ In her October 6, 2014 report, Dr. Watkins Campbell had reported ROM findings for appellant's right shoulder and applied the ROM methodology for evaluating right upper extremity permanent impairment under Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides*. She also found that appellant had nine percent permanent impairment of her right upper extremity due to restricted right shoulder ROM.

⁷ At the hearing held on January 23, 2017, counsel argued that the opinion of Dr. Slutsky was erroneous because he had indicated that appellant did not have lateral epicondylitis and, therefore, disallowed an accepted condition.

⁸ See 20 C.F.R. §§ 1.1-1.4.

use of specified members, functions, and organs of the body.⁹ 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.¹⁰

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).¹¹ 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.¹²

ANALYSIS

The issue on appeal is whether appellant has met her burden of proof to establish more than 10 percent permanent impairment of her right upper extremity, for which she previously received schedule awards. 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 had been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹³ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁴ 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.¹⁵ Furthermore, the Board observed that physicians

⁹ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

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

¹¹ *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).

¹² *Isidoro Rivera*, 12 ECAB 348 (1961).

¹³ *See T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁴ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁵ *Supra* note 13.

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 were inconsistent 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.¹⁶

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the February 27, 2017 decision. Utilizing 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 decision.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: October 2, 2017
Washington, DC

Christopher J. Godfrey, 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

¹⁶ *Id.*