

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

A.H, Appellant)	
)	
and)	Docket No. 17-0286
)	Issued: April 12, 2018
U.S. POSTAL SERVICE, QUEENS)	
PERFORMANCE & DISTRIBUTION CENTER,)	
Flushing, N.Y, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 21, 2016 appellant, through counsel, filed a timely appeal from a September 20, 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 over the merits of the claim.

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 established more than six percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On September 19, 2008 appellant, then a 38-year-old mail handler, filed an occupational disease claim (Form CA-2), alleging that a partial thickness rotator cuff tear in her left shoulder was caused or aggravated by factors of her federal employment. OWCP accepted her occupational disease claim for partial thickness left rotator cuff tear. Appellant did not initially stop work. OWCP subsequently paid her intermittent wage-loss compensation benefits on the supplemental rolls for temporary total disability.

On January 9, 2015 appellant filed a claim for a schedule award (Form CA-7). As no medical evidence was submitted with her claim, by letters dated January 20 and March 10, 2015 OWCP requested that she submit an impairment evaluation from her attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

In support of her claim, appellant submitted a July 7, 2015 impairment rating from Dr. Pran N. Sood, a Board-certified orthopedic surgeon. Dr. Sood found that appellant reached maximum medical improvement (MMI) on October 22, 2013.⁴ He noted that she had limited abduction and forward flexion to 110 degrees of her left shoulder. Rotation was relatively free and her neurological assessment was normal. For the left upper extremity, Dr. Sood found that appellant had 12 percent permanent impairment of her left upper extremity under the A.M.A., *Guides*. He indicated that his calculation was based on Table 15-1, page 385 and Table 15-5, shoulder regional grid, page 401 for partial tear of the shoulder.

OWCP's district medical adviser (DMA) reviewed the claim on September 11, 2015, and found that appellant had six percent permanent impairment of the left upper extremity.⁵ The DMA found that MMI occurred on May 24, 2011, when a physical therapist noted her condition was stable. His six percent impairment rating was based on appellant's loss of range of motion (ROM) in her left shoulder under Table 34, page 475 of the A.M.A., *Guides*.

By decision dated October 22, 2015, OWCP granted appellant a schedule award for six percent permanent impairment of her left upper extremity. The award covered 18.72 weeks, from May 24 to October 2, 2011 and was based on her weekly pay rate on the date disability began,

³ A.M.A., *Guides* (6th ed. 2009).

⁴ The record does not contain treatment notes dated October 22, 2013, nor does Dr. Sood provide rationale for choosing this date for MMI.

⁵ The DMA's signature is illegible.

July 19, 2007.⁶ OWCP based the award on the DMA's September 11, 2015 impairment rating, noting that the DMA correctly applied the [A.M.A., *Guides*] to the examination findings.

On November 4, 2015 counsel requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held July 12, 2016. Counsel argued that the DMA's impairment rating was based on the ROM, but the diagnosis-based impairment (DBI) used by Dr. Sood was more realistic.

By decision dated September 20, 2016, OWCP's hearing representative affirmed its prior schedule award decision.

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 FECA program with OWCP.⁷ 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.⁸ 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.⁹

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, [s]ixth [e]dition, *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*.¹⁰ The Board has approved the use by OWCP of the A.M.A., *Guides* for

⁶ On a December 18, 2009 Form CA-7, the employing establishment indicated that appellant stopped work on July 19, 2007 and her pay rate effective that date was \$44,495.00 per year with night differential of \$35.92 per week and Sunday premium of \$43.44 per week.

⁷ See 20 C.F.R. §§ 1.1-1.4.

⁸ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁹ 20 C.F.R. § 10.404; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹⁰ 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 purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹¹

ANALYSIS

The issue on appeal is whether appellant has met her burden of proof to establish that she has more than six percent permanent impairment of the left upper extremity, for which she previously received a schedule award. 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.¹² The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹³ 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 DMA's 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.¹⁴

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the September 20, 2016 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly, and after such other development as may be deemed necessary, OWCP shall issue a *de novo* decision with regard to appellant's claim for an upper extremity schedule award.¹⁵

CONCLUSION

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

¹¹ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹² *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁴ *Supra* note 12.

¹⁵ *See* FECA Bulletin No. 17-0006 (issued May 8, 2017).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 12, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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