

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

G.R., Appellant)	
)	
and)	Docket No. 17-1550
)	Issued: April 17, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Newaygo, MI, 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 July 7, 2017 appellant, through counsel, filed a timely appeal from a May 3, 2017 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.

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 her left upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On April 10, 2014 appellant, then a 53-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a repetitive motion injury causally related to factors of her federal employment. She did not stop work. OWCP accepted the claim, assigned File No. xxxxxx419, for other affectations of the left shoulder region not otherwise classified.³

OWCP had previously accepted that appellant sustained left shoulder tendinitis under OWCP File No. xxxxxx502. It administratively combined File No. xxxxxx502 with the present claim.

Dr. Christopher Hudson, Board-certified in family practice, opined on July 23 and October 16, 2015 that appellant had reached maximum medical improvement (MMI).⁴

On December 7, 2015 appellant filed a claim for a schedule award (Form CA-7). By letter dated December 8, 2015, OWCP requested that she submit an impairment evaluation from her attending physician addressing the extent of any employment-related permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵

In a March 9, 2016 impairment evaluation, Dr. Catherine Watkins Campbell, Board-certified in family practice, recounted appellant's history of injury and continued complaints of left shoulder pain. On examination she found no laxity in the shoulders bilaterally with mild joint tenderness on the left side. Dr. Watkins Campbell measured range of motion (ROM) of the left shoulder⁶ three times and found a grade 4/5 strength deficit. She opined that appellant had reached MMI on October 16, 2015. Dr. Watkins Campbell found three percent permanent impairment due to a loss of left shoulder flexion and one percent impairment for loss of adduction using Table 15-34 on page 475 of the A.M.A., *Guides*, which she added to find four percent permanent impairment of the left upper extremity. She applied a grade modifier of three for functional history based on appellant's *QuickDASH* score of 73, to find no change from the four percent left upper extremity impairment rating.

³ In a decision dated July 3, 2014, OWCP denied appellant's claim as the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted work factors. By decision dated May 13, 2015, it vacated its July 3, 2014 decision and accepted her claim for left shoulder impingement.

⁴ A June 20, 2015 magnetic resonance imaging (MRI) scan revealed moderate tendinopathy of the rotator cuff and moderate glenohumeral and acromioclavicular joint osteoarthritis.

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ Dr. Watkins Campbell indicated that she was measuring appellant's right rather than left shoulder; however, it is apparent from the context of her report that this was a typographical error.

An OWCP medical adviser reviewed the evidence on April 7, 2016 and noted that Dr. Watkins Campbell based her impairment rating on ROM, which the A.M.A., *Guides* indicated was used primarily as an adjustment factor. He found that appellant's impairment should be related using the diagnosis-based impairment (DBI) method. The medical adviser identified the diagnosis as impingement syndrome using Table 15-5 on page 402 of the A.M.A., *Guides*, which yielded a default value of one percent. He found that applying grade modifiers would not alter the award.⁷

By decision dated June 1, 2016, OWCP granted appellant a schedule award for one percent permanent impairment of her left upper extremity. The period of the award ran for 3.12 weeks from January 4 to 25, 2016.

On June 13, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. During the telephone hearing, held on February 16, 2017, counsel maintained that recent Board decisions remanded cases for clarification regarding the use of ROM in rating permanent impairment of the upper extremities.

By decision dated May 3, 2017, OWCP's hearing representative affirmed the June 1, 2016 decision. She found that OWCP's medical adviser properly applied the provisions of the A.M.A., *Guides* to the findings by Dr. Watkins Campbell.

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 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

⁷ In an April 21, 2016 supplemental report, OWCP's medical adviser concurred with Dr. Hudson's finding that appellant obtained MMI occurred on July 23, 2015. On April 29, 2016 he found that she reached MMI on October 16, 2015. In a supplemental report dated May 14, 2016, the medical adviser opined that appellant reached MMI on January 4, 2016, the date of the impairment evaluation used to rate her impairment.

⁸ See 20 C.F.R. §§ 1.1-1.4.

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

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

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 more than one percent permanent impairment of her 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.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 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 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.¹⁵

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 May 3, 2017 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities

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

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

¹⁵ *Supra* note 13.

to be applied uniformly,¹⁶ 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 the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 17, 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

¹⁶ See FECA Bulletin No. 17-06 (May 8, 2017).