United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 17-1017**
	)	**Issued: December 4, 2018**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Los Angeles, CA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 10, 2017 appellant, through counsel, filed a timely appeal from the January 31, 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 claim.[3]

[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.*

[3] The record provided to the Board includes evidence received after OWCP issued its January 31, 2017 decision. The Board's review is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met his burden of proof to establish permanent impairment of his left upper extremity entitling him to a schedule award.

FACTUAL HISTORY

On September 6, 2008 appellant, then a 43-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that he injured his left shoulder on August 18, 2008 when the trailer door he was pulling down came off the track. He stopped work on August 18, 2008. OWCP accepted the claim for a left shoulder strain. On December 12, 2008 it expanded the claim to include cervical radiculopathy to the left shoulder. Appellant returned to limited-duty, full-time employment in April 2009. He was released to full duty without restrictions on May 20, 2009. Appellant performed regular duty until August 12, 2009, when he stopped work due to increased shoulder symptoms. OWCP paid wage-loss compensation and medical benefits.

On August 20, 2009 appellant filed an occupational disease claim (Form CA-2) alleging a worsening of his cervical condition due to his work duties. OWCP assigned the claim File No. xxxxxx881 and accepted an aggravation of cervical radiculopathy. File No. xxxxxx881 was administratively combined with the current claim which was then designated as the master file.[4]

In a February 25, 2010 report, Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon and second opinion physician, noted the history of the work injuries, reviewed the medical records and statement of accepted facts, and presented examination findings. Due to a concern about an inflammatory arthritis, he ordered an arthritis panel along with the sedimentation rate.[5] Dr. Bleecker also ordered new electrodiagnostic studies of both upper extremities. He found that appellant was totally disabled. Dr. Bleecker responded that OWCP's questions would be answered after he reviewed the testing ordered.

In a July 15, 2010 report, Dr. Seymour Levine, a Board-certified rheumatologist and internist serving as second opinion physician, opined that appellant had a widespread inflammatory polyarthritis, most compatible with seronegative rheumatoid arthritis. He reviewed appellant's complete medical record and opined that the findings were not neurologic, but rather rheumatologic in terms of widespread synovitis and was not connected to a work injury. Dr. Levine indicated that the synovitis was present to such an extent that appellant had significant weakness of the bilateral hands. He further opined that appellant was temporarily

[4] File No. xxxxxx881 is in closed status.

[5] Appellant underwent an arthritis panel on February 25, 2010, an electromyogram/nerve conduction velocity (EMG/NCV) study of the bilateral upper extremities on March 16, 2010 and a magnetic resonance imaging (MRI) scan of the cervical spine on March 26, 2010. In a March 31, 2010 report, Dr. Bleecker recommended that appellant be seen for a rheumatological consultation as the testing indicated that there may be an inflammatory arthropathy and a cervical radiculopathy. He responded that he could not answer OWCP's questions until it was determined whether appellant's inflammatory process was related to his work. In an April 9, 2010 addendum report, Dr. Bleecker again replied that it could not be determined that the accepted conditions were proper diagnoses until appellant underwent a workup from a rheumatological standpoint.

totally disabled on a nonindustrial basis due to his rheumatoid arthritis. Dr. Levine further opined that there were no limitations related to appellant's left shoulder work injury.

In a July 21, 2010 addendum report, Dr. Bleecker opined that appellant recovered from the accepted left shoulder strain. However, appellant still had residuals of the C6-7 radiculopathy. The remainder of his symptoms were secondary to the rheumatoid arthritis and were not medially connected to the work injury.

Dr. Kenneth R. Sabbag, an orthopedic surgeon, provided impressions of cervical radiculopathy, left shoulder strain/sprain, and nonindustrial rheumatoid arthritis. In an April 7, 2011 report, he noted that appellant was a candidate for cervical spine surgery, but that he did not wish to pursue surgical care and was controlling his symptoms at the present time.

By decision dated May 11, 2011, OWCP terminated appellant's medical benefits for the left shoulder strain effective May 11, 2011. It found that the weight of the medical evidence with Dr. Bleecker, a Board-certified orthopedic surgeon and second opinion physician, who opined, in a July 21, 2010 addendum report, that appellant no longer had a left shoulder condition. OWCP continued to authorize appellant's medical benefits and disability for the accepted employment-related cervical radiculopathy. It noted that Dr. Bleecker noted that, while appellant had confirmed rheumatoid arthritis, he also continued to have residuals of his employment-related cervical radiculopathy. OWCP also noted that Dr. Sabbag's reports indicated ongoing treatment for cervical radiculitis. Appellant did not appeal this decision.

Appellant retired on disability effective June 9, 2011.

On February 8, 2012 Dr. Sabbag indicated that appellant had reached maximum medical improvement. He noted that appellant was unable to perform his usual job, but was able to work in a sedentary position with permanent restrictions. Dr. Sabbag indicated that activity exacerbated appellant's underlying rheumatoid arthritis.

In an August 15, 2014 report, Dr. John L. Howard, a Board-certified orthopedic surgeon and second opinion physician, provided an impression of status post strain of the left shoulder and widespread polyarthritis, rheumatoid arthritis. Based on the history provided by appellant and his review of the medical records and examination findings, Dr. Howard opined that there were no remaining residuals of the accepted medical conditions. Rather, appellant's symptoms were due to his severely debilitating rheumatoid arthritis, which also rendered him totally disabled for any work.

In an October 22, 2014 report, Dr. Sabbag indicated that he last saw appellant on July 9, 2014. It was his opinion that because of his industrial conditions and nonindustrial conditions, appellant was substantially incapacitated for employment. Dr. Sabbag noted that appellant had rheumatoid arthritis and cervical radiculopathy. He indicated that the only way to rule out whether appellant's ongoing disability was due to radiculopathy or the arthritic issues was to do perform an additional MRI scan of the cervical spine and conduct new EMG/NCV studies.

By decision dated October 29, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits effective October 29, 2014.[6] It found that the weight of the medical evidence rested with Dr. John L. Howard, a Board-certified orthopedic surgeon and second opinion physician, who opined in his August 15, 2014 report that there were no remaining residuals of the accepted medical conditions.

Appellant requested a hearing before an OWCP hearing representative.

By decision dated April 16, 2015, the hearing representative affirmed the termination of benefits. He noted that the October 22, 2014 report from Dr. Sabbag was insufficient to warrant reinstatement of appellant's benefits or for further development of the evidence. Appellant did not appeal the April 16, 2016 hearing representative's decision.

On March 11, 2016 appellant filed a claim for a schedule award (Form CA-7). No evidence was provided with the schedule award claim. OWCP did not issue a development letter.

By decision dated March 23, 2016, OWCP denied the claim for a schedule award. It found that the weight of the medical evidence, as represented by Dr. Howard's second opinion report of August 14, 2015, established that appellant had no residuals of the accepted medical conditions.

On April 8, 2016 appellant, through counsel, requested a telephone hearing before OWCP's Branch of Hearings and Review.

In an August 3, 2016 report, Dr. Mesfin Seyoum, a family practitioner, noted the history of the August 18, 2008 employment injury, appellant's history of rheumatoid arthritis, and reviewed medical records which ended in 2010. He provided evaluation findings of the cervical spine, left shoulder, and upper extremities. Dr. Seyoum opined that appellant had cervical radiculopathy involving the left C5, C6, and C7 nerve roots and restricted range of left shoulder motion and pain. Based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he opined that appellant had 24 percent total left upper extremity impairment and 17 percent total left shoulder impairment due to the accepted conditions of left-sided cervical radiculopathy and left shoulder sprain. For the left upper extremity radiculopathy involving the left C5, C6, and C7 nerve roots, Dr. Seyoum indicated that he used *The Guides Newsletter* Rating Spinal Nerve Extremity Impairment (July/August 2009 edition) (*The Guides Newsletter*). For the total left C5 nerve root, he found 11 percent upper extremity impairment, which comprised of 3 percent sensory and 8 percent motor impairments. For the total left C6 nerve root, Dr. Seyoum found eight percent upper extremity impairment, which comprised of three percent sensory and five percent motor impairment. For the total left C7 nerve root, he found seven percent upper extremity impairment, which comprised of two percent sensory and five percent motor impairments. The total left upper extremity radiculopathy impairment was 24 percent. Dr. Seyoum also found that appellant had 17 percent total left shoulder impairment under the range of motion method. He provided all his impairment calculations under the A.M.A., *Guides*.

[6] File No. xxxxxx881 is in closed status. *See infra* note 4.

A telephonic hearing was held on November 16, 2016. Counsel argued that OWCP's decision was improper as it was obligated to develop the schedule award claim if appellant submitted *prima facie* evidence of a permanent impairment after termination of benefits. He also cited to Board precedent that the fact that appellant's compensation was terminated does not necessary preclude appellant from entitlement to a schedule award.[7] The case record was held open for 30 days to allow appellant to submit any additional medical evidence. Nothing further was received.

By decision dated January 31, 2017, an OWCP hearing representative affirmed the March 23, 2016 schedule award denial. The hearing representative found that Dr. Seyoum's August 3, 2016 report could not be used as *prima facie* evidence of permanent impairment as it was not based on an accurate medical and factual history of the claims in question.

LEGAL PRECEDENT

The schedule award provision of FECA[8] and its implementing federal regulations[9] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to rate permanent impairment.[11]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.[12] In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[13]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an

[7] *See M.K.*, Docket No. 16-0243 (issued May 9, 2016).

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id.* at § 10.404(a).

[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] *Pamela J. Darling*, 49 ECAB 286 (1998).

[13] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

alternative approach to rating spinal nerve impairments. OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables as outlined in *The Guides Newsletter*.[14]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[15]

OWCP procedures and Board precedent provide that termination of a claim for all benefits due to a finding of no residuals of the accepted condition does not bar a subsequent schedule award. Rather the claims examiner should consider the schedule award matter separately from the termination of benefits.[16] This is because a claimant may have an employment-related condition that results in a permanent impairment under the A.M.A., *Guides* without any disability for work or the need for continuing medical treatment.[17] If a claimant applies for a schedule award after termination and submits sufficient medical evidence reflecting a permanent impairment as a result of the work-related injury exposure, the claims examiner should develop the claim further, even if a finding of no residuals has previously been made.[18]

ANALYSIS

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

On March 11, 2016 appellant filed a claim for a schedule award which was denied by decision dated March 23, 2016. Appellant, through counsel, requested an oral hearing and submitted an August 3, 2016 impairment rating report of Dr. Seyoum which found 17 percent upper extremity permanent impairment. By decision dated January 31, 2017, OWCP's hearing representative affirmed the denial of the schedule award.

As noted above, if a claimant requests a schedule award after termination and submits sufficient medical evidence of permanent impairment as a result of the work-related injury, OWCP should develop the claim further, even if a finding of no residuals has previously been made.[19]

[14] *See supra* note 11 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4; *see also E.P.*, Docket No. 16-1154 (issued October 26, 2016).

[15] *See supra* note 11 at Chapter 2.808.6(f) (February 2013).

[16] *See B.K.*, 59 ECAB 228 (2007); Federal (FECA) Procedure Manual Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.11 (February 2013).

[17] *B.K., id.*

[18] *Supra* note 11 at Chapter 2.808.11(a) (February 2013).

[19] *Supra* note 18.

The Board finds that OWCP did not properly develop the issue of permanent impairment following the submission of the report of Dr. Seyoum. Pursuant to its procedures, OWCP should have routed the case record, along with Dr. Seyoum's August 3, 2016 report, to its medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[20] As this was not done, the case must be remanded to OWCP's medical adviser.

On remand, OWCP shall further develop the medical evidence of record and obtain an opinion from a medical adviser or second opinion physician regarding the nature and extent, if any, of appellant's impairment for his accepted conditions. Following this and further development deemed necessary, OWCP shall issue a *de novo* merit decision regarding appellant's schedule award claim.[21]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 31, 2017 is set aside and the case is remanded for further development consistent with this decision.

Issued: December 4, 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

[20] *See supra* note 11 at Chapter 2.808.6(f) (February 2013).

[21] Due to the disposition of this case, counsel's assertions on appeal will not be addressed.