United States Department of Labor
Employees' Compensation Appeals Board

G.K., Appellant	)	
and	)	**Docket No. 17-1255**
	)	**Issued: December 14, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Dayton, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 19, 2017 appellant, through counsel, filed a timely appeal from an April 3, 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 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 met her burden of proof to establish greater than 20 percent permanent impairment of the right upper extremity and 20 percent permanent impairment of the left upper extremity for which she previously received schedule award compensation.

FACTUAL HISTORY

On September 15, 1998 appellant, then a 39-year-old distribution window clerk, filed an occupational disease claim (Form CA-2) alleging a right hand and bilateral arm condition that she attributed to repetitive motions while performing her employment duties.[3] OWCP accepted the claim for bilateral carpal tunnel syndrome, bilateral flexor synovitis of hands, and bilateral lesion of ulnar nerve. On April 14, 1999 appellant filed a claim for a schedule award (Form CA-7). By decision dated August 6, 1999, OWCP granted appellant a schedule award for 20 percent permanent impairment of the right upper extremity and 20 percent permanent impairment of the left upper extremity. The period of award ran from May 20, 1999 to October 9, 2001.

On July 9, 2010 appellant filed a claim for a schedule award (Form CA-7).

In an August 4, 2010 report, Dr. William N. Grant, a Board-certified internist, opined that appellant had nine percent permanent impairment of the left wrist and nine percent permanent impairment of the right wrist based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[4]

OWCP referred appellant to Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related condition(s). In his August 19, 2011 report, Dr. Fisher opined that appellant had reached maximum medical improvement (MMI) as of June 10, 1997 regarding her neck sprain, June 30, 1999 regarding her bilateral carpal tunnel syndrome, and May 1, 1998 regarding her bilateral synovitis of the hands. He concluded that appellant had a total of six percent permanent impairment of the upper extremities arising from her accepted work-related conditions from all of her injury claims of April 10, 1997, February 1, 1998, February 1, 1999, and April 11, 2002.

In a September 14, 2011 report, Dr. Martin Fritzhand, a Board-certified urologist, determined that appellant had nine percent permanent impairment of the left upper extremity and six percent permanent impairment of the right upper extremity.

[3] OWCP assigned the present claim OWCP File No. xxxxxx764. Appellant was also injured on April 10, 1997 when she slipped and jarred her neck and back while trying to catch herself. That claim, assigned OWCP File No. xxxxxx505, was allowed for limited medical treatment only. Appellant was injured again on February 1, 1999 while picking up a tub of mail. OWCP accepted that claim, assigned OWCP File No. xxxxxx505, for thoracic sprain, right shoulder sprain, and lumbosacral sprain. On or about April 11, 2002 appellant reported a left elbow condition that she attributed to repetitive work activities. OWCP accepted that claim, assigned OWCP File No. xxxxxx422 for right trigger thumb and an authorized left elbow surgery performed on September 25, 2003. These claims have been administratively combined, with OWCP File No. xxxxxx764 serving as the master file.

[4] A.M.A., *Guides* (6th ed. 2009).

On December 8, 2011 an OWCP medical adviser reviewed the reports from Dr. Fisher and Dr. Fritzhand and concluded that "each physician provided his own clinical impression according to his own clinical judgment" and indicated that he could not "make a definite determination as to whose rating [was] more accurate."

OWCP referred appellant to Dr. Manhal Ghanma, a Board-certified orthopedic surgeon, for another second opinion evaluation to determine the nature and extent of her permanent impairment. In his April 30, 2013 report, Dr. Ghanma determined that appellant had three percent permanent impairment of the right upper extremity and six percent permanent impairment of the left upper extremity.

OWCP found that a conflict existed between Dr. Fisher and Dr. Fritzhand. On June 25, 2013 Dr. Albert E. Becker, Jr., a Board-certified orthopedic surgeon, performed an impartial medical examination. He found that appellant had reached MMI in late 2004 and assigned the date of September 28, 2004. Dr. Becker concluded that appellant had three percent permanent impairment of the right upper extremity and seven percent permanent impairment of the left upper extremity.

In an October 4, 2013 report, Dr. Morley Slutsky, an OWCP medical adviser and Board-certified occupational medicine specialist, reviewed the medical evidence of record and determined that appellant had two percent permanent impairment of the right upper extremity regarding her right median nerve and two percent permanent impairment of the right and left upper extremity regarding her bilateral carpal tunnel syndrome according to the sixth edition of the A.M.A., *Guides*.

On December 11, 2013 Dr. Becker disagreed with Dr. Slutsky's impairment rating.

By decision dated February 12, 2014, OWCP found that appellant was previously paid a schedule award for 20 percent permanent impairment of the right upper extremity and 20 percent permanent impairment of the left upper extremity and the medical evidence of record was insufficient to establish an increase in the impairments already compensated.

On February 17, 2014 counsel requested an oral hearing by a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held before an OWCP hearing representative on August 15, 2014.

Subsequently, counsel submitted an addendum report dated August 26, 2014 from Dr. Fritzhand who opined that appellant had 25 percent permanent impairment of the left upper extremity.

By decision dated November 4, 2014, OWCP's hearing representative found Dr. Becker's report insufficient to resolve the conflict in medical opinion evidence, vacated the prior decision, and remanded the case for a new referee evaluation to resolve the conflict of medical opinion regarding greater impairment due to all of appellant's accepted employment-related conditions.

OWCP referred appellant to Dr. Arthur F. Lee, a Board-certified orthopedic surgeon, for a referee examination. In his January 23, 2015 report, Dr. Lee opined that appellant had six percent permanent impairment of the right and left upper extremities based on her diagnosis of carpal tunnel syndrome and ulnar neuropathy at the elbow.

On March 19, 2015 Dr. Slutsky found that Dr. Lee's January 23, 2015 report did not provide detailed rating calculations with rationale to justify any of his conclusions. The medical adviser recommended referring appellant to a new referee physician.

In a supplemental report dated May 15, 2015, Dr. Lee provided clarifications to his initial report.

On May 20, 2015, however, Dr. Slutsky continued to find that Dr. Lee's opinion was not supported by detailed calculations and lacked probative value.

OWCP referred appellant to Dr. Roger Meyer, a Board-certified orthopedic surgeon, for a new referee examination. In his January 29, 2016 report, Dr. Meyer found that appellant's current diagnoses were bilateral carpal tunnel syndrome, bilateral villonodular synovitis of the hands, bilateral lesion of the ulnar nerve, lumbar sprain, and left ulnar neuropathy of the elbow. He advised that appellant was not capable of performing her date-of-injury job and restricted her to sedentary work with light use of her hands and no lifting, bending, or prolonged standing/walking due to her lumbar conditions. Utilizing the diagnosis-based impairment (DBI) method, Dr. Meyer determined that appellant had reached MMI in 2004 and opined that appellant had two percent permanent impairment of the right and left upper extremities due to her bilateral carpal tunnel syndrome, three percent permanent impairment of the right upper extremity, five percent permanent impairment of the left upper extremity based on her ulnar nerve condition, nine percent permanent impairment for the triggering of her digits, and five percent permanent impairment for her lumbar condition.

On March 1, 2016 Dr. David I. Krohn, OWCP's district medical adviser (DMA) and Board-certified internist, reviewed the medical evidence of record and noted that Dr. Meyer failed to perform a *Quick*DASH (Disabilities of the Arm, Shoulder, and Hand) or functional scale when determining appellant's impairment rating due to her diagnosis of bilateral carpal tunnel syndrome. He also found that, regarding appellant's diagnosis of bilateral cubital tunnel syndrome, Dr. Meyer did not discuss ulnar nerve impairment as required under Table 15-23, page 449, of the A.M.A., *Guides*. The medical adviser concluded that, regardless of the outcome of the issues raised above, appellant's bilateral upper extremity impairments would not exceed the 20 percent rating previously awarded.

In an April 21, 2016 addendum report, Dr. Meyer stated that, regarding the carpal tunnel syndrome rating, he "did go through the calculations that [Dr. Krohn] outlined and is the reason [he] came up with the [two percent] as [Dr. Krohn] nicely calculated." With regard to the bilateral cubital tunnel syndrome, he found that the electromyography (EMG) criteria for a significant block at either elbow was not present, which is why he calculated a two percent permanent impairment for both the right and left upper extremity. Dr. Meyer determined that appellant had reached MMI on June 25, 2013 for her bilateral cubital tunnel syndrome and "December 1, 200" for her bilateral carpal tunnel syndrome.

On May 5, 2016 Dr. Krohn concurred with Dr. Meyer's rating of two percent permanent impairment of the right upper extremity, but disagreed with his rating for the left upper extremity. He calculated that appellant had five percent permanent impairment of the left upper extremity. Dr. Krohn, however, continued to find that appellant's right and left upper extremity impairments did not exceed the 20 percent rating previously awarded.

By decision dated May 13, 2016, OWCP denied appellant's claim for an additional schedule award because the medical evidence did not establish that appellant had greater than 20 percent permanent impairment of the right upper extremity and 20 percent permanent impairment of the left upper extremity, for which she previously received schedule award compensation.

On May 23, 2016 counsel requested an oral hearing by a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held before an OWCP hearing representative on January 18, 2017. OWCP did not receive any additional medical evidence regarding the extent of appellant's bilateral upper extremity permanent impairment.

By decision dated April 3, 2017, OWCP's hearing representative accepted Dr. Krohn's opinion and found that appellant had not established that she had greater than 20 percent permanent impairment of the right upper extremity and 20 percent permanent impairment of the left upper extremity for which she previously received schedule award compensation. Consequently, she affirmed OWCP's May 13, 2016 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 the FECA program with the Director of OWCP.[5] 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.[6] 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.[7]

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

[5] *See* 20 C.F.R. §§ 1.1-1.4.

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

[7] 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).[8] The Board has approved OWCP's use 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.[9]

ANALYSIS

The issue on appeal is whether appellant met her burden of proof to establish that she has greater than 20 percent permanent impairment of the right upper extremity and 20 percent permanent impairment of the left upper extremity for which she previously received schedule award compensation.

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 range of motion (ROM) methodology when assessing the extent of permanent impairment for schedule award purposes.[10] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[11] In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed that 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 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.[12]

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the April 3, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly,

[8] *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).

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

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

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

[12] *See T.H., supra* note 10.

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.[13]

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 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: December 14, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

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