United States Department of Labor
Employees' Compensation Appeals Board

H.C., Appellant	)	
and	)	**Docket No. 18-0986**
	)	**Issued: December 19, 2018**
U.S. POSTAL SERVICE, SHARED SERVICES CENTER, Pittsburgh, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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 16, 2018 appellant, through counsel, filed a timely appeal from a November 28, 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 to consider 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 established more than 12 percent permanent impairment of his left upper extremity for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 5, 2005 appellant, then a 55-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on May 3, 2005 he injured his left upper arm while in the performance of duty. OWCP accepted the claim for left shoulder/arm sprain, left shoulder primary osteoarthritis, left bicipital tenosynovitis, and other affection of the left shoulder region.

On April 4, 2007 appellant underwent authorized left shoulder arthroscopy, subacromial decompression, distal clavicle excision, minor anterior labral debridement, and biceps tenotomy.

In a report dated June 29, 2012, Dr. Andrew J. Gelman, an osteopathic physician Board-certified in orthopedic surgery, provided physical examination findings relative to appellant's shoulders.[4] He related that appellant's shoulders exhibited restricted mobility in all planes, both left and right sided. On the left active forward flexion was 110 degrees, with abduction to 85 degrees, and internal rotation to the left rear pocket.

In a January 6, 2015 report, Dr. Nicholas P. Diamond, an osteopathic physician, used the diagnosed-based impairment (DBI) method for rating impairments. He determined that, under Table 15-5 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] the combined impairments resulted in a combined value of 35 percent left upper extremity permanent impairment. Dr. Diamond also determined that appellant had 24 percent right upper extremity permanent impairment.

On April 12, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a June 2, 2015 report, Dr. Arnold T. Berman, OWCP's district medical adviser (DMA), Board-certified in orthopedic surgery, determined that appellant had 12 percent permanent of impairment of the left upper extremity based on Dr. Diamond's January 6, 2015 findings and report, in combination with other medical evaluations.

[3] Docket No. 16-0323 (issued April 10, 2017).

[4] Appellant was referred to Dr. Gelman for an impartial evaluation in OWCP File No. xxxxxx920 to resolve whether appellant had bilateral brachial plexopathy, or other bilateral conditions causally related to his occupational disease claim.

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

By decision dated June 23, 2015, OWCP issued a schedule award for 12 percent permanent impairment of the left upper extremity.

Appellant, through counsel, appealed to the Board on December 8, 2015. By decision dated April 10, 2017, the Board set aside the June 23, 2015 decision.[6] The Board found that OWCP had inconsistently applied Chapter 15 of the A.M.A., *Guides* regarding the proper use of either the DBI or range of motion (ROM) methodology in assessing the extent of permanent impairment. The Board remanded the case for OWCP to issue a *de novo* decision after development of a consistent method for calculating permanent impairment of the upper extremities.

In a November 16, 2017 report, Dr. Morley Slutsky, a DMA Board-certified in occupational medicine, reviewed the medical record with the exception of Dr. Diamond's January 6, 2015 report, as it had not been provided for his review and he determined that appellant had a 10 percent left upper extremity permanent impairment. He based his impairment rating and date of maximum medical impairment (MMI) on the June 29, 2012 report from Dr. Gelman. Dr. Slutsky noted that Dr. Gelman provided invalid ROM measurements that appellant was rated using the DBI method. He referenced Table 15-5 of the A.M.A., *Guides*, Shoulder Regional Grid, Upper Extremity Impairment, acromioclavicular injury or disease, class 1, distal clavicle resection. Dr. Slutsky then utilized the adjustment grid and grade modifiers, and determined that appellant had a functional history adjustment grade modifier of 1, a physical examination adjustment grade modifier of 1, and a clinical study adjustment grade modifier of 1, as clinical studies confirmed lesions of rotator cuff/SLAP labral biceps tendon tear. Utilizing the adjustment formula resulted in no adjustment to the default value of grade C, resulting in a 10 percent permanent impairment.

By decision dated November 28, 2017, OWCP denied appellant's claim for an increased schedule award for the left upper extremity. It related that, pursuant to FECA Bulletin No. 17-06, the evidence did not support more than the 12 percent permanent impairment of the left upper extremity, for which he previously received schedule award compensation.

LEGAL PRECEDENT

The schedule award provision of FECA,[7] and its implementing federal regulations,[8] 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

[6] *Supra* note 3.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.[10]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by a grade modifier 4 for functional history (GMFH), a grade modifier 4 for physical examination (GMPE), and a grade modifier 2 for clinical studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides, in part:

> "As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).
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> "Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. If the A.M.A., *Guides* allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used."[12]
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> The Bulletin further advises:
>
> "If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE."
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> "If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* do not allow for the use of ROM for the diagnosis in question, the DMA should independently calculate impairment using the DBI method and clearly explain in the report, citing applicable tables in Chapter 15 of the [A.M.A.,] *Guides*, that ROM is not permitted as an alternative rating method for the diagnosis in question.

[9] *Id.* at § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

[11] A.M.A., *Guides* 411.

[12] FECA Bulletin 17-06 (issued May 8, 2017). *See also D.F.*, Docket No. 17-1474 (issued January 23, 2018).

> "If the rating physician provided an assessment using the DBI method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE.
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> "If the medical evidence of record is [in]sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."[13]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP 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.[14]

ANALYSIS

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

The record establishes that, by decision dated April 10, 2017, the Board remanded the case to OWCP for application of a consistent policy for establishing permanent impairment under Chapter 15 of the A.M.A., *Guides* to appellant's schedule award claim. OWCP then obtained a medical report from its DMA, Dr. Slutsky. In his November 16, 2017 report, Dr. Slutsky noted that he used Dr. Gelman's report to calculate appellant's permanent impairment, as Dr. Diamond's January 6, 2015 report had not been provided for his review. He found that, because Dr. Gelman provided invalid ROM measurements for the shoulders, the DBI method was the preferred method to calculate appellant's impairment. Dr. Slutsky concluded that appellant had 10 percent permanent impairment of his left upper extremity, which was less than the prior award of 12 percent, with June 29, 2012 as the date of MMI.

The Board finds that, when rendering his impairment rating, Dr. Slutsky did not have all the relevant medical evidence as OWCP failed to provide the most recent medical report dated January 6, 2015, which was from Dr. Diamond. There is no evidence in this case that OWCP requested appellant or Dr. Diamond or its referral physician, Dr. Gelman, to provide a supplemental report containing ROM measurements in accordance with the procedures set forth in the A.M.A., *Guides* and FECA Bulletin No. 17-06. As noted above, FECA Bulletin No. 17-06 provides that, if the medical evidence of record is insufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating.

[13] *Id.*

[14] *See supra* note 10 at Chapter 2.808.6(f) (March 2017).

The Board will, therefore, remand the case for OWCP to refer appellant for a second opinion evaluation to obtain the necessary evidence. Following such further development of the evidence as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 28, 2017 is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: December 19, 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