United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 17-1349**
	)	**Issued: February 7, 2018**
DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL INSTITUTE, Fort Dix, NJ, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 7, 2017 appellant, through counsel, filed a timely appeal from a February 22, 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 established permanent impairment of his upper extremities, warranting a schedule award.

FACTUAL HISTORY

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

On September 1, 2004 appellant, then a 54-year-old fabric worker supervisor, filed a traumatic injury claim (Form CA-1) alleging that, on June 30, 2004, he injured his upper back, shoulders, and hands in the performance of duty. OWCP accepted the claim for a temporary aggravation of brachial neuritis or radiculitis. It paid appellant compensation for total disability from September 26, 2004 until November 1, 2007, when he elected retirement benefits.

Electrodiagnostic testing performed November 3, 2004 revealed right cervical radiculopathy at the C8 nerve root and mild right carpal tunnel syndrome. A magnetic resonance imaging (MRI) scan study of the right shoulder showed osteoarthritis at the glenohumeral and acromioclavicular joints with labral degeneration.

Appellant, on June 19, 2008, filed a claim for a schedule award (Form CA-7). In support of his claim, he submitted a December 18, 2007 impairment evaluation from Dr. Steven M. Allon, an orthopedic surgeon, who found that he had 19 percent right upper extremity permanent impairment and 14 percent left upper extremity permanent impairment using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] On October 7, 2009 Dr. Allon, using the sixth edition of the A.M.A., *Guides*,[5] identified the right upper extremity diagnoses as class 1 degenerative joint disease of the right shoulder, class 1 severe sensory deficit of the right ulnar nerve, and entrapment neuropathy of the right median nerve. He determined that appellant had a total right arm permanent impairment of 19 percent. Dr. Allon found 29 percent left arm permanent impairment due to a sensory deficit of the left ulnar nerve and left median nerve.

Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and OWCP medical adviser, disagreed with Dr. Allon's finding of a sensory deficit of the right ulnar nerve and left median nerve. He opined that appellant had 15 percent permanent impairment of the right upper extremity due to entrapment neuropathy, using Table 15-23 on page 449, and four percent permanent impairment of the left upper extremity due to a sensory deficit of the ulnar nerve under Table 15-21 on page 443.

[3] Docket No. 14-0436 (issued July 21, 2014).

[4] A.M.A., *Guides* (5th ed. 2001).

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

OWCP determined that a conflict existed between Dr. Allon and Dr. Magliato regarding the extent of appellant's upper extremity impairment, and referred him to Dr. Ronald L. Gerson, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Gerson, however, did not provide an impairment rating appropriately using the sixth edition of the A.M.A., *Guides*. Consequently, on April 28, 2011 OWCP referred appellant to Dr. George Glenn, a Board-certified orthopedic surgeon, for a second impartial medical examination. The statement of accepted facts (SOAF) did not include the accepted conditions.

Dr. Glenn, on May 16, 2011, measured range of motion of the shoulders and found C8 radiculopathy demonstrated by electrodiagnostic testing unsupported by complaints on clinical evaluation. He attributed the C8 radiculopathy in part to the work injury. Dr. Glenn opined that appellant's arthritis and loss of shoulder motion was not due to his work injury. He identified the diagnosis of and class 1 shoulder pain using Table 15-5 on page 401. After applying grade modifiers, Dr. Glenn found no impairment of the bilateral upper extremities.

On June 21, 2012 Dr. Magliato reviewed Dr. Glenn's opinion and noted that he attributed appellant's loss of range of motion of the spine and right shoulder to preexisting degeneration, but further found that the June 30, 2004 work injury caused an aggravation of the C8 nerve root deficit. He recommended that Dr. Glenn clarify his findings.

In response to OWCP's request for clarification, on October 3, 2012 Dr. Glenn opined that the work-related aggravation of the C8 radiculopathy had resolved. He asserted that appellant's continued symptoms were not related to his June 30, 2004 work injury.

Dr. Magliato reviewed Dr. Glenn's report on October 23, 2012 and concurred with his finding that appellant had no permanent impairment of either arm.

By decision dated March 12, 2013, OWCP denied appellant's claim for a schedule award. On March 18, 2013 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a report dated July 9, 2013, Dr. David Weiss, an osteopath, opined that appellant had 17 percent permanent impairment of the right upper extremity and 7 percent permanent impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*. He based his report on his December 18, 2007 examination and his review of subsequent reports from Dr. Glenn and Dr. Magliato dated 2011 and 2012, respectively.

Following a July 15, 2013 hearing, by decision dated September 18, 2013, an OWCP hearing representative affirmed the March 12, 2013 decision. She determined that Dr. Glenn's report constituted the special weight of the evidence and established that appellant had no permanent impairment due to his accepted employment injury.

Appellant appealed to the Board. By decision dated July 21, 2014, the Board set aside the September 18, 2013 decision. It found that OWCP had failed to provide Dr. Glenn with a SOAF setting forth the accepted conditions as required under its procedures and that his opinion was thus insufficient to resolve the conflict in medical opinion. The Board further found that Dr. Magliato, who was on one side of the conflict, improperly reviewed the report of the referee

physician. The Board remanded the case for OWCP to prepare a new SOAF and obtain an opinion sufficient to resolve the pertinent issue of appellant's entitlement to a schedule award.

On January 16, 2015 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination. Based on his report, by decision dated September 24, 2015, it denied appellant's schedule award claim.

Appellant, through counsel, on September 30, 2015 requested an oral hearing before an OWCP hearing representative. Following a preliminary review, by decision dated December 7, 2015, OWCP's hearing representative set aside the September 24, 2015 decision, finding that OWCP erred in referring appellant to Dr. Askin for a second opinion examination when the record contained an unresolved conflict in medical opinion. She instructed OWCP to exclude the opinion of Dr. Askin from the record and refer appellant for a new impartial medical examination.

OWCP, by letter dated May 13, 2016, referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated May 24, 2016, Dr. Stark reviewed the history of injury and the medical reports of record. He discussed appellant's current symptoms of pain radiating to his shoulder, weakness in the bilateral upper extremities, and tingling and numbness in the hands bilaterally. On examination Dr. Stark found no tenderness or atrophy of the left shoulder and no atrophy of the right shoulder. He found negative impingement and apprehension tests, negative Tinel's sign and Phalen's test for the median and ulnar nerves at the bilateral wrists, and a negative Tinel's test for the ulnar nerve at the bilateral elbows. Dr. Stark noted that the claim was accepted for a temporary aggravation of brachial neuritis or cervical radiculitis. He reviewed Dr. Allon's finding of 19 percent impairment due to degenerative joint disease of the shoulder and deficits of the ulnar and median nerve. Dr. Stark related that there was "no clinical evidence of severe sensory deficit to the right ulnar nerve, no evidence that there is any damage to the right ulnar nerve, and no evidence of entrapment neuropathy of the right median nerve." He concluded that appellant had no employment-related right arm permanent impairment. Dr. Stark further related, "As to his left upper extremity, there is no indication that [he] is suffering from any ulnar sensory deficit or severe sensory deficit to his left median nerve. Therefore, it is my opinion that there is [zero percent] permanent impairment for his left upper extremity." He opined that the accepted condition of an aggravation of brachial neuritis or cervical radiculitis had resolved.

On August 25, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and OWCP medical adviser, concurred with Dr. Stark's finding that appellant had no permanent impairment of either the right or left arm due to his June 30, 2004 employment injury.

By decision dated September 30, 2016, OWCP denied appellant's schedule award claim. It found that the opinion of Dr. Stark, the impartial medical examiner, was entitled to special weight and established that appellant did not have an employment-related permanent impairment of the upper extremities.

On October 11, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. On January 10, 2017 counsel submitted an August 15, 2013 report from Dr. Weiss. Dr. Weiss noted that he had evaluated appellant on December 18, 2007

and advised that he based his impairment rating on Dr. Glenn's October 3, 2012 examination. Referring to his prior report dated July 9, 2013, he opined that, under the sixth edition of the A.M.A., *Guides*, appellant had 18 percent left upper extremity permanent impairment due to loss of motion and a sensory deficit on the left at C5 and C7.

During the hearing, held on January 18, 2017, counsel contended that the claim should be expanded to include additional conditions. He also questioned how the accepted condition of brachial neuritis and radiculitis changed to temporary aggravation of the condition. Counsel noted that OWCP did not provide the impairment ratings found by Dr. Allon and Dr. Magliato in its conflict statement to the impartial medical examiner. He further asserted that Dr. Stark did not reference the A.M.A., *Guides* or *The Guides Newsletter* (July/August 2009).[6]

By decision dated February 22, 2017, OWCP's hearing representative affirmed the September 30, 2016 decision. She found that Dr. Stark's referee opinion constituted the special weight of the evidence and established that appellant was not entitled to a schedule award as a result of his accepted work injury.

On appeal counsel asserts that a November 3, 2004 cervical MRI scan study showed C6-7 defects and an EMG showed radiculopathy at C8 and right carpal tunnel syndrome. He maintains that Dr. Stark's opinion is insufficient to resolve the conflict in medical opinion as he did not reference the A.M.A., *Guides* or *The Guides Newsletter* in reaching his conclusions. Counsel further contends that Dr. Stark did not sufficiently describe how he performed his neurological or motor strength testing, explain whether preexisting conditions resulted in impairment, or discuss appellant's surgery on his left shoulder.

LEGAL PRECEDENT

The schedule award provisions 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 the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] 20 C.F.R. § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his employment.[11] The Board notes that, before applying the A.M.A., *Guides*, OWCP must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.[12]

If there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[13] In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

Dr. Stark examined appellant for an impartial medical examination regarding the extent of permanent impairment, if any, resulting from the accepted employment injury. When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[15]

In a report dated May 24, 2016, Dr. Stark reviewed the medical evidence and provided examination findings, noting that appellant had no shoulder atrophy bilaterally, a negative Tinel's sign and Phalen's test of the median and ulnar nerves at the wrist and a negative Tinel's sign at the ulnar nerve. He found no evidence of entrapment neuropathy or other damage at the right ulnar nerve and thus no right upper extremity impairment. Dr. Stark further found no ulnar or median sensory deficit and thus no impairment of the left upper extremity. He opined that the temporary aggravation of brachial neuritis or cervical radiculitis had resolved. Dr. Stark's opinion is based on a proper factual background and supported by rationale; consequently, his opinion is entitled to special weight as the impartial medical examiner.[16] He thoroughly reviewed appellant's history and provided findings on examination. Dr. Stark sufficiently explained how his findings supported his conclusion that appellant's temporary aggravation of brachial neuritis or cervical radiculitis had resolved and that he had no ratable impairment due to the work injury.[17]

[11] *Veronica Williams*, 56 ECAB 367 (2005); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[12] *Michael S. Mina*, 57 ECAB 379 (2006).

[13] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[14] *See B.P.*, Docket No. 08-1457 (issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[15] *See Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[16] *See L.W.*, Docket No. 13-1374 (issued November 15, 2013).

[17] *See M.M.*, Docket No. 12-1271 (issued December 27, 2012).

An OWCP medical adviser, Dr. Harris, reviewed Dr. Stark's opinion on August 25, 2016 and concurred with his conclusion. The Board, therefore, finds that Dr. Stark's opinion constitutes the special weight of the evidence and establishes that appellant has no employment-related permanent impairment of the upper extremities.[18]

Following OWCP's decision, appellant submitted an August 15, 2013 report from Dr. Weiss, which was based on a December 2007 evaluation and review of medical reports from 2012. Dr. Weiss' report, however, is of diminished probative value as it was based on a six-year-old physical examination rather than a current physical examination.[19] His report, therefore, is insufficient to overcome the special weight afforded Dr. Stark's opinion or to create a new conflict.

On appeal counsel contends that an MRI scan study showed defects at C6-7 and a November 2004 electromyogram showed C8 radiculopathy and right carpal tunnel syndrome. The issue, however, is whether appellant currently has an employment-related permanent impairment due to his June 30, 2004 work injury.

Counsel argues that Dr. Stark's opinion is insufficient to resolve the conflict in the medical opinion as he did not refer to the A.M.A., *Guides* or *The Guides Newsletter*. Dr. Stark, however, found no evidence of the accepted condition and thus no permanent impairment.

Counsel additionally maintains that Dr. Stark did not determine whether preexisting conditions caused impairment or describe how he performed neurological and strength testing. A preexisting impairment may be included in the calculation of percentage of loss referable to a work-related injury.[20] However, where there is no demonstrated permanent impairment due to an accepted workplace injury, the claim is not ripe for consideration of any preexisting impairment.[21] As noted, Dr. Stark listed detailed findings on physical examination and concluded that appellant had no impairment due to his accepted work injury.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not established permanent impairment of his upper extremities, warranting a schedule award.

[18] *See L.W.*, *supra* note 16.

[19] *Id*.

[20] *M.F.*, Docket No. 16-1089 (issued December 14, 2016)*; Thomas P. Lavin*, 57 ECAB 353 (2006).

[21] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board