United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 17-1826**
	)	**Issued: February 26, 2018**
U.S. POSTAL SERVICE, NETWORK DISTRIBUTION CENTER, Kansas City, KS, Employer	)	

Appearances:
Houston Ford, Jr., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 29, 2017 appellant, through her representative, filed a timely appeal from a July 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 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 15 percent permanent impairment of the right upper extremity, for which she previously received schedule awards.

FACTUAL HISTORY

On September 25, 2013 appellant, then a 41-year-old modified mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained headaches and pain in her shoulder, arm, wrist, hand, and fingers causally related to factors of her federal employment. OWCP assigned File No. xxxxxx866 and accepted the claim for an aggravation of spinal stenosis in the cervical region at C5-6 and C6-7.

OWCP previously accepted that appellant sustained right carpal tunnel syndrome under File No. xxxxxx535. Appellant underwent an authorized right carpal tunnel release on November 16, 2001. In a March 3, 2003 decision, issued under File No. xxxxxx535, OWCP granted her a schedule award for 10 percent permanent impairment of the right upper extremity due to carpal tunnel syndrome.

OWCP also accepted that appellant sustained right medial and lateral epicondylitis, right shoulder tendinitis, and cervical strain under File No. xxxxxx136.[3] By decision dated February 7, 2006 under File No. xxxxxx136, it granted her a schedule award for five percent permanent impairment of the right upper extremity due to loss of range of motion of the shoulder.[4] OWCP combined appellant's claims under master File No. xxxxxx535.

In an impairment evaluation dated February 17, 2016, Dr. M. Stephen Wilson, an orthopedic surgeon, discussed appellant's history of injury and the results of diagnostic studies. On examination, he found weakness in the shoulders, elbows, and wrists bilaterally and a loss of sensation at the "C6 dermatomes of the bilateral upper extremities." Dr. Wilson further found muscle spasms from C2 through C7 bilaterally and a loss of two-point discrimination at C6 and C7 on the right. He applied the sixth edition of the American Medical Association, *Guides to Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] to his clinical findings.

Citing proposed Table 1 of *The Guides Newsletter*, Rating Spinal Nerve Impairment Using the Sixth Edition (July/August 2009),[6] Dr. Wilson found that appellant had mild sensory loss at C6, which yielded a default value of one percent, and mild motor loss at C6, which yielded a default value of five percent. He applied grade modifiers of one for functional history

[3] OWCP additionally accepted that appellant sustained an aggravation of spondylolisthesis under File No. xxxxxx874.

[4] In an August 7, 2008 decision, issued under File No. xxxxxx136, OWCP denied appellant's claim for an increased schedule award.

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

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (Exhibits 1, 4) (January 2010).

and clinical studies, for no adjustment from the default value. Dr. Wilson utilized the Combined Values Chart to find six percent right upper extremity permanent impairment due to C6 radiculopathy. He further found mild sensory and motor loss at C7, which yielded default values of one percent and five percent, respectively. Dr. Wilson applied grade modifiers of one for functional history and two for clinical studies, which he determined yielded no adjustment from the default values. He combined the right upper extremities impairments to find 12 percent right upper extremity permanent impairment resulting from cervical radiculopathy at C6 and C7. Dr. Wilson indicated that appellant had previously received a schedule award for 15 percent permanent impairment of the right upper extremity due to carpal tunnel syndrome, and related that it was his "opinion that her right upper extremity neuropathy as a result of the injury to her neck be considered separately from her previous injury and rating to her hand."

On April 14, 2016 appellant filed a claim for a schedule award (Form CA-7) under File No. xxxxxx866.

Dr. Herbert White, Jr., an occupational medicine specialist serving as an OWCP medical adviser, reviewed the evidence on July 17, 2016 and concurred with Dr. Wilson's finding that appellant had 12 percent permanent impairment of the right upper extremity due to radiculopathy at C6 and C7. He advised that he could not address whether she had impairment due to her right carpal tunnel syndrome and epicondylitis. Dr. White opined that the 12 percent permanent impairment was "in addition to the award already given."

On September 8, 2016 OWCP requested that Dr. White clarify whether the current percentage found was in addition to the prior schedule award for 15 percent permanent impairment of the right upper extremity due to right carpal tunnel syndrome, right elbow medial and lateral epicondylitis, and right shoulder tendinitis. On September 12, 2016 Dr. White related that the current impairment of the right upper extremity was 12 percent, less than that previously awarded, and thus appellant was not entitled to an additional award.

By decision dated October 5, 2016, OWCP denied appellant's request for an additional schedule award. It found that she had no more than the previously awarded 15 percent right upper extremity permanent impairment.

Appellant, on October 26, 2016, requested an oral hearing before an OWCP hearing representative.

In a report dated October 19, 2016, Dr. Wilson noted that he rated appellant on February 17, 2016 for radiculopathy at C6 and C7 using *The Guides Newsletter*.

At the telephone hearing, held on May 16, 2017, appellant's representative maintained that the 12 percent permanent impairment rating for radiculopathy was separate from the previous right upper extremity awards.

By decision dated July 28, 2017, OWCP's hearing representative affirmed the October 5, 2016 decision. She found that appellant's 12 percent right upper extremity permanent impairment was less than the 15 percent previously awarded, and therefore was not entitled to an additional schedule award.

On appeal appellant's representative asserts that Dr. Wilson found 12 percent permanent impairment and notes that Dr. White initially concurred with his finding that the impairment rating was in addition to the prior award. He argues a conflict now exists between Dr. White and Dr. Wilson.

LEGAL PRECEDENT

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

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.[12] 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 outlined in a July/August 2009, *The Guides Newsletter*.[13]

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.* at § 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).

[11] A.M.A., *Guides* 494-531.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5c(3) (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

[13] Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[14]

ANALYSIS

OWCP accepted that appellant sustained right carpal tunnel syndrome under File No. xxxxxx535, right medial and lateral epicondylitis, right shoulder tendinitis, and cervical strain under File No. xxxxxx136, and an aggravation of cervical spinal stenosis at C5-6 and C6-7 under File No. xxxxxx866.

By decision dated March 3, 2003, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity due to carpal tunnel syndrome under File No. xxxxxx535. In a February 7, 2006 decision, it granted her a schedule award for five percent permanent impairment of the right upper extremity due to reduced range of motion of the right shoulder under File No. xxxxxx136.

On April 14, 2016 appellant requested a schedule award under File No. xxxxxx866. In a February 17, 2016 impairment evaluation, Dr. Wilson, referencing *The Guides Newsletter*, opined that appellant had six percent permanent impairment of the right upper extremity due to sensory and motor loss at C6 and six percent permanent impairment of the right upper extremity due to sensory and motor loss at C7, for a total right upper extremity permanent impairment of 12 percent.

Dr. White, an OWCP medical adviser, reviewed the evidence of record on July 17, 2016 and concurred with Dr. Wilson's finding that appellant had 12 percent permanent impairment of the right upper extremity due to C6 and C7 radiculopathy. He indicated that the 12 percent permanent impairment was in addition to the prior awards, noting that he was unable to determine if she had permanent impairment as a result of her right carpal tunnel syndrome and medial and lateral epicondylitis. On September 12, 2016 Dr. White indicated that as the current permanent impairment of 12 percent was less than the prior awards, appellant was not entitled to an additional schedule award.

The Board finds that the case is not in posture for decision. A claimant is not precluded from an additional schedule award solely because he or she received a greater award to the same scheduled member from another claim.[15] The issue is whether the current impairment rating duplicates in whole or in part the prior rating.[16] As the Board has explained in *J.S.*, simply comparing the prior percentage of impairment awarded to the current impairment for the same member is not always sufficient.[17] In *J.S.*, the claimant had received a prior schedule award of

[14] 20 C.F.R. § 10.404(d); *see T.S.*, Docket No. 16-1406 (issued August 9, 2017); *T.S.*, Docket No. 09-1308 (issued December 22, 2009).

[15] *See J.K.*, Docket No. 16-1361 (issued April 18, 2017).

[16] *See supra* note 13.

[17] *See J.S.*, Docket No. 15-1252 (issued January 19, 2016).

54 percent permanent impairment for the right leg. The medical evidence showed permanent impairment of the right ankle of 12 percent, but OWCP found no additional permanent impairment because the current impairment was not greater than the prior award. The Board remanded the case, finding there was no medical evidence explaining how the current permanent impairment duplicated the prior impairment.[18]

In this case, OWCP's medical adviser was not provided with a complete factual and medical background with respect to the prior schedule awards. OWCP should have provided a complete background and requested a medical adviser provide an opinion regarding the current permanent impairment to the right upper extremity and its relationship to the prior schedule awards. The case will be remanded to OWCP to properly resolve the issue presented. After such further development as is deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 28, 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: February 26, 2018
Washington, DC

Christopher J. Godfrey, 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

[18] *Id*.