United States Department of Labor
Employees' Compensation Appeals Board

B.A., Appellant	)	
and	)	**Docket No. 17-1360**
	)	**Issued: January 10, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Columbus, 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:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 12, 2017 appellant, through counsel, filed a timely appeal from an April 4, 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.

ISSUE

The issue is whether appellant has more than 40 percent permanent impairment of each upper extremity, for which she previously received schedule awards.

[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.*

FACTUAL HISTORY

On January 9, 1998 appellant, then a 35-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained carpal tunnel syndrome as a result of her federal employment duties. She began to work modified duty on January 9, 1998 with restrictions of no lifting, pushing, or repetitive motions. OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and bilateral trigger ring finger and tenovaginotomy by decision dated March 9, 1998.

On March 25, 1998 appellant underwent right carpal tunnel release and right trigger finger release surgery. She also underwent left carpal tunnel release and left trigger finger release surgery on April 15, 1998. Appellant stopped work and received wage-loss compensation from March 25 to April 24, 1998. OWCP placed her on the periodic rolls effective April 28, 1998. Appellant returned to part-time modified duty on July 8, 1998. OWCP paid her wage-loss compensation for partial disability.

On April 28, 2000 appellant filed a claim for a schedule award (Form CA-7).

In a July 25, 2000 impairment rating report, Dr. Christopher D. Cannell, Board-certified in physical medicine and rehabilitation, noted appellant's accepted conditions of bilateral carpal tunnel syndrome and reviewed the medical treatment she received. He indicated that appellant reached maximum medical improvement (MMI) on January 1, 2000. Dr. Cannell opined that according to Table 16, page 57, of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] appellant had 40 percent permanent impairment of each upper extremity for severe median nerve entrapment at the wrist bilaterally. He related that the 40 percent permanent upper extremity impairment translated to 24 percent whole person impairment under Table 3 of the A.M.A., *Guides*.

In an August 23, 2000 report, an OWCP medical adviser reviewed appellant's schedule award claim and noted a date of MMI of January 1, 2000. Referencing the fourth edition of the A.M.A., *Guides*, Table 16, he determined that appellant had 40 percent permanent impairment of each upper extremity for severe median nerve entrapment of the right and left wrists.

On September 5, 2000 OWCP granted appellant a schedule award for 40 percent permanent impairment of each upper extremity. The award ran for 249.60 weeks from January 1, 2000 to October 13, 2004.

Under OWCP File No. xxxxxx323, appellant filed a traumatic injury claim (Form CA-1) alleging that, on November 24, 2014, she sustained injuries to her knees, right shoulder, and right arm when she fell down at work. She did not stop work. OWCP accepted appellant's claim for bilateral knee contusions, right upper arm strain, and right shoulder rotator cuff tear.

On July 16, 2015 appellant underwent authorized right shoulder arthroscopy with rotator cuff repair. She stopped work and received wage-loss compensation benefits for total disability until November 13, 2015. On December 1, 2015 appellant returned to part-time, limited duty,

[3] A.M.A., *Guides* (4th ed. 1993).

working four hours per day. She continued to receive wage-loss compensation benefits for partial disability. On March 1, 2016 appellant returned to full duty.

Appellant filed a claim for a schedule award (Form CA-7) noting both accepted OWCP claims.

By letters dated April 12 and May 10, 2016, OWCP requested that appellant provide a medical report from her treating physician with an opinion on whether she had reached MMI and whether she had obtained a permanent impairment rating utilizing the sixth edition of the A.M.A., *Guides*.[4] Appellant was afforded 30 days to submit the additional evidence.

OWCP received an April 18, 2016 impairment rating report from Dr. Martin Fritzhand, an occupational medicine specialist, who noted that appellant's claim was accepted for bilateral carpal tunnel syndrome and bilateral trigger finger and he discussed the medical treatment appellant received, including her surgeries. Upon physical examination of appellant's right wrist, Dr. Fritzhand reported tenderness on palpation over the volar aspect and well-preserved grasp strength. He indicated that pinprick and light touch were diminished over the right hand and digits. Tinel's sign was negative and range of motion was normal. Dr. Fritzhand explained that appellant's right wrist symptoms had improved following surgery until she sustained an injury to her right upper extremity in November 2014. Appellant complained of exacerbated pain and discomfort involving the right hand.

Dr. Fritzhand reported that appellant reached MMI by March 2016. He related that her subjective symptoms were certainly corroborated by objective findings. Utilizing the sixth edition of the A.M.A., *Guides*, Table 15-23, Dr. Fritzhand determined that appellant had grade modifier of 1 for test findings and 3 for physical examination and history, which resulted in a net adjustment formula of 2. He indicated that she had a *Quick*DASH score of 66, which moved the number to the right, resulting in six percent right upper extremity impairment.

In a May 19, 2016 report, Dr. Arthur Harris, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed appellant's medical records, including Dr. Fritzhand's April 18, 2016 impairment rating report, and noted that the record did not contain a statement of accepted facts (SOAF). Utilizing Table 15-23 of the sixth edition of the A.M.A., *Guides*, he indicated that appellant had a grade modifier of 2. Dr. Harris opined that appellant had six percent right upper extremity permanent impairment for residual problems with moderate carpal tunnel syndrome. He noted a date of MMI of April 18, 2016. Dr. Harris explained that Dr. Fritzhand did not document any physical examination or provide impairment rating calculations regarding residual problems with the left upper extremity. He further related that appellant had previously received a schedule award of 40 percent permanent impairment of each upper extremity, so she did not have an increase in right or left upper extremity impairment.

According to a telephone memorandum (Form CA-110) dated June 14, 2016, OWCP informed appellant that she had two schedule award requests for the same area, so it had to combine the cases.

[4] *Id*. at (6th ed. 2009).

By decision dated June 24, 2016, OWCP denied appellant's schedule award claim because the medical evidence of record failed to establish an increase in the permanent impairment previously awarded. It noted that Dr. Harris, an OWCP medical adviser, concluded in a May 19, 2016 report that appellant had six percent right upper extremity permanent impairment. OWCP explained that because appellant previously received a schedule award for 40 percent permanent impairment of each upper extremity, she was not entitled to an additional schedule award.

OWCP administratively combined the November 24, 2014 traumatic injury claim, File No. xxxxxx323, with the current case File No. xxxxxx892, with the latter serving as the master file.

On July 1, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

OWCP issued a SOAF dated July 13, 2016. It indicated that appellant had an occupational disease claim that was accepted for bilateral carpal tunnel syndrome and bilateral trigger ring finger and was granted a schedule award of 40 percent permanent impairment of each upper extremity. The SOAF further noted that appellant had a traumatic injury claim that was accepted for right shoulder sprain, right shoulder rotator cuff tear, and bilateral knee contusion.

By letters dated October 7 and December 16, 2016, counsel indicated that he wanted to follow-up on the progress of appellant's schedule award claim. He requested that OWCP advise when appellant may expect a decision.

On February 14, 2017 a telephone hearing was held. Counsel noted that appellant sustained right shoulder and bilateral knee injuries at work on November 24, 2014, for which she underwent surgery. He related that appellant had not received a schedule award for her traumatic injury claim. Counsel alleged that appellant's previous 40 percent permanent impairment rating under the fifth edition[5] of the A.M.A., *Guides* did not apply to a sixth edition evaluation because they changed the rules. He asserted that it was a violation of due process to enforce or use the 40 percent impairment rating and not pay the recent 6 percent permanent impairment rating under the sixth edition of the A.M.A., *Guides.* Counsel further indicated that it would be impossible under the sixth edition to get higher than 40 percent permanent impairment rating for this type of injury because the sixth edition did not provide for it.

By decision dated April 4, 2017, an OWCP hearing representative affirmed the June 24, 2016 decision because the medical evidence of record failed to establish an increase in the permanent impairment previously awarded. She further determined that counsel failed to demonstrate that OWCP erred in developing the claim for an increased schedule award based upon the sixth edition of the A.M.A., *Guides*.

[5] The Board notes that counsel repeatedly referenced the fifth edition of the A.M.A., *Guides* even though appellant's previous schedule award was rated using the fourth edition of the A.M.A., *Guides.*

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing regulations[7] 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[9]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[10] In addressing impairment for the upper extremities, the sixth edition of the A.M.A., *Guides* requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History, Physical Examination, and Clinical Studies.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[13] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[14]

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[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404

[8] *Id*.; *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement (6th ed. 2009).

[11] *Id*. at 385-419; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

[12] *Id.* at 411.

[13] *Supra* note 9 at Chapter 2.808.5 (February 2013).

[14] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

OWCP procedures provide that any previous impairment to the member under consideration is included in calculating the percentage of loss, except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.[15]

ANALYSIS

Under the current case file, OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and bilateral ring trigger finger and tenovaginotomy and granted appellant a schedule award for 40 percent permanent impairment of each upper extremity. Under File No. xxxxxx323, OWCP accepted appellant's claim for bilateral knee contusions, right upper arm strain, and right shoulder rotator cuff tear as a result of a November 24, 2014 employment injury. Appellant filed a claim for a schedule award. In decisions dated June 24, 2016 and April 4, 2017, OWCP denied her schedule award claim because the medical evidence of record failed to establish that she was entitled to an additional schedule award greater than the 40 percent permanent impairment of each upper extremity, for which she previously received schedule awards.

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

OWCP referred appellant's claim to Dr. Harris, an OWCP medical adviser, to review the medical record and determine whether appellant sustained additional impairment due to her accepted bilateral carpal tunnel syndrome and bilateral ring trigger finger conditions in accordance with the sixth edition of the A.M.A., *Guides.* In a May 19, 2016 report, Dr. Harris referenced Table 15-23 and opined that appellant had six percent right upper extremity permanent impairment for residual problems with moderate carpal tunnel syndrome. He noted a date of MMI of April 18, 2016. Dr. Harris explained that because appellant had previously received schedule awards of 40 percent permanent impairment of each upper extremity, she did not have an increase in right or left upper extremity impairment.

The Board notes that while Dr. Harris responded to OWCP's questions regarding appellant's accepted bilateral carpal and bilateral trigger ring finger conditions, it failed to ask him to address whether she sustained permanent impairment due to her November 24, 2014 employment injury, for which she also filed a claim for schedule award. The record demonstrates that appellant had additional accepted conditions of bilateral knee contusions, right upper extremity sprain, and right rotator cuff tear as a result of a November 24, 2014 employment injury. Dr. Harris did not mention these additional work-related conditions, nor did he provide an opinion on whether she sustained any additional permanent impairment to her left and right upper extremities as a result of the November 24, 2014 employment injury.[16]

[15] *Supra* note 9 at Chapter 2.808.7(a)(1) (February 2013); *see also L.G.*, Docket No. 15-1289 (issued January 21, 2016).

[16] *See C.S.*, Docket No. 16-1585 (issued August 17, 2017).

Furthermore, while OWCP indicated that a SOAF was enclosed, Dr. Harris related that there was no SOAF in the record for him to review.[17]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[18] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[19] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[20] As it did not request that Dr. Harris address whether appellant had any additional permanent impairment of her right and left upper extremities causally related to her November 24, 2014 employment injury, his report is insufficient to resolve the pertinent issue in this case. Furthermore, Dr. Harris' opinion was not based on a SOAF.[21] The Board, therefore, finds that the case must be remanded to OWCP. On remand, OWCP should prepare a SOAF to include all accepted injuries. The case shall then be forwarded to Dr. Harris for a supplemental report in which he addresses whether appellant has permanent impairment in accordance with the sixth edition of the A.M.A., *Guides* due to all of her accepted employment injuries. Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

CONCLUSION

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

[17] *See A.K.*, Docket No. 08-1672 (issued January 29, 2009).

[18] *See Vanessa Young*, 55 ECAB 575 (2004).

[19] *See Richard E. Simpson*, 55 ECAB 490 (2004).

[20] *See R.M.*, Docket No. 16-0147 (issued June 17, 2016); *Melvin James*, 55 ECAB 406 (2004).

[21] The Board has held that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of limited probative value. *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for proceedings consistent with this decision.

Issued: January 10, 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