

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
W.F., Appellant)	
)	
and)	Docket No. 17-0646
)	Issued: July 3, 2018
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Akron, OH, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 February 1, 2017 appellant, through counsel, filed a timely appeal from a December 15, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 met his burden of proof to establish greater than four percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On January 13, 2012 appellant, then a 49-year-old dock mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on January 12, 2012, his right shoulder popped while trying to move a loaded pallet while in the performance of duty. OWCP accepted the claim for right shoulder impingement. A recurrence of appellant's disability was accepted on May 24, 2012. On October 2, 2012 appellant underwent right shoulder arthroscopy of the glenohumeral joint, arthroscopy of the subacromial space, arthroscopic subacromial decompression (ASO), rotator cuff repair, and arthroscopic glenohumeral debridement. He was off work from April 6, 2012 to January 12, 2013. Appellant was off work intermittently from August to September 18, 2014. On September 18, 2014 he returned to work with no restrictions. OWCP paid wage-loss compensation and medical benefits.

On September 15, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a December 12, 2014 report, Dr. Catherine Watkins Campbell, Board-certified in family practice and occupational medicine, noted appellant's history of injury and treatment. She utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) hereinafter (A.M.A., *Guides*),³ and provided range of motion (ROM) measurements. Dr. Watkins Campbell referred to Table 15-5 Shoulder Regional Grid under acromioclavicular (AC) joint injury or disease, class 1 status post for a distal clavicle resection and explained that this was chosen as the method of rating the impairment.⁴ She noted a functional history modifier of 1 was appropriate based on a *QuickDASH* (Disabilities of the Arm, Shoulder, and Hand) score of 33, a physical examination modifier of 1 based on mild ROM deficits and mild instability findings. Dr. Watkins Campbell determined that appellant had 10 percent right upper extremity permanent.

OWCP's district medical adviser (DMA), Dr. Morley Slutsky, Board-certified in occupational medicine, reviewed the claim on August 14, 2015, utilized the diagnosis-based impairment (DBI) method to determine impairment and found four percent right upper extremity impairment under the A.M.A., *Guides*. He explained that appellant was rated for a partial rotator cuff tear as it was the most prevalent and significant finding and was responsible for the loss of shoulder motion. Dr. Slutsky noted that Dr. Watkins Campbell had rated appellant for AC joint disease status post acromioplasty. He explained that this was equal to the same impairment range as a partial rotator cuff tear (one minus five percent upper extremity). Dr. Slutsky explained that Dr. Watkins Campbell erroneously rated appellant as if he underwent a distal clavicle resection, which was not the surgery performed on October 2, 2012. He opined that Dr. Watkins Campbell's

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.* at 403, Table 15-5.

rating was inconsistent with appellant's surgery. Dr. Slutsky determined that appellant reached maximum medical improvement on September 23, 2014. His four percent right upper extremity impairment rating was based on residuals of a partial thickness rotator cuff tear under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 401-05.

On September 9, 2015 a copy of the DMA's report was provided to Dr. Watkins Campbell for comment. OWCP allotted 30 days for a response. No response was received.

By decision dated November 23, 2015, OWCP granted appellant a schedule award for four percent permanent impairment of his right upper extremity. The award covered a period of 12.48 weeks, from September 23 through December 19, 2014.

On December 9, 2015 appellant, through counsel, requested a telephonic hearing, which was held before an OWCP hearing representative on August 2, 2016. He noted that he contacted Dr. Watkins Campbell, but did not receive any response. Counsel argued that OWCP should further develop the record for a new medical opinion. He also discussed the impairment rating and explained that appellant had more than just a partial thickness rotator cuff tear. Counsel also presented argument concerning how the DMA inappropriately applied the A.M.A., *Guides*.

By decision dated December 15, 2016, OWCP's hearing representative affirmed the November 23, 2015 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 of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

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).

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 the use by OWCP 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 has met his burden of proof to establish that he has greater than four percent permanent impairment of his right upper extremity, for which he previously received a schedule award.

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

The Board has found that OWCP had 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 had been followed regarding the proper use of the DBI or the 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 were at odds over the proper methodology for rating upper extremity impairment, having observed 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.¹² 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.¹³

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the December 15, 2016 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied

⁸ 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 (March 2017).

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 supra* note 9

¹³ *Supra* note 10.

uniformly,¹⁴ 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.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: July 3, 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

¹⁴ See FECA Bulletin No. 17-06 (issued May 8, 2017).