

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

R.B., Appellant)	
)	
and)	Docket No. 17-1117
)	Issued: June 6, 2018
U.S. POSTAL SERVICE, CANTON)	
PERFORMANCE & DISTRIBUTION CENTER,)	
Canton, 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 May 1, 2017 appellant, through counsel, filed a timely appeal from a February 24, 2017 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 the claim.

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 that he has greater than four percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On October 12, 2012 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that his left shoulder rotator cuff tear was a result of the repetitive and constant lifting, pushing and pulling of heavy objects required by his federal employment duties. The employing establishment indicated that appellant last worked on January 20, 2011. OWCP accepted the conditions of left supraspinatus tear, left superior glenoid labrum tear, and left shoulder tendinitis and paid appropriate benefits.³

On January 8, 2013 appellant underwent an approved left shoulder arthroscopic surgery performed by Dr. Joseph Hellman, a Board-certified orthopedic surgeon. He resumed modified work on June 20, 2013, but stopped all work on June 22, 2013 and filed a claim for a traumatic injury (Form CA-1).⁴

Appellant remained under the care of Dr. Hellman. In an October 9, 2013 treatment note, Dr. Hellman reported that appellant had good power, motion, and pain control of the left shoulder after rotator cuff repair. He noted that appellant had reached maximum medical improvement (MMI) with no restrictions.

Appellant filed a schedule award claim (Form CA-7) on December 15, 2014.

By development letter dated December 19, 2014, OWCP asked appellant to provide an impairment rating from his physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ Appellant was afforded 30 days to submit the requested information. No additional evidence was received, and on April 24, 2015, OWCP denied appellant's claim for a schedule award.

Appellant elected disability retirement benefits, effective January 2, 2015.

On May 4, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

³ Under OWCP File No. xxxxxx034, OWCP accepted a traumatic injury of August 22, 2011 for other and unspecified complications of medical care. Under OWCP File No. xxxxxx427, appellant has an accepted traumatic injury of March 26, 2009 for right shoulder conditions.

⁴ Under OWCP File No. xxxxxx374, OWCP denied the traumatic claim on November 7, 2013, finding insufficient factual support for the work exposure.

⁵ A.M.A., *Guides* (6th ed. 2009).

Prior to the hearing, appellant submitted a November 24, 2015 report from Dr. Catherine Watkins Campbell, a Board-certified family practitioner. Dr. Watkins Campbell noted the accepted left shoulder conditions, performed a medical record review, and provided physical examination findings. She noted that Dr. Hellmann found appellant had reached MMI of the left shoulder on October 9, 2013. Dr. Watkins Campbell indicated that the most impairing condition was the full-thickness rotator cuff tear. Using the diagnosis-based impairment (DBI) method of the A.M.A., *Guides*, she opined that appellant sustained a total seven percent impairment of the left upper extremity based on a diagnosis of left supraspinatus tear. Dr. Watkins Campbell provided discussion of the findings supporting the impairment rating she provided, referenced the pages and tables used, and provided detailed calculations explaining how she arrived at the impairment figure.

A hearing was held on November 16, 2015. By decision dated January 27, 2016, an OWCP hearing representative set aside the April 24, 2015 decision and remanded the case to OWCP for further development. Specifically, the hearing representative found that the narrative report from Dr. Watkins Campbell was sufficient to warrant further development of the evidence to determine whether appellant's employment injury caused permanent injury to the left upper extremity under the A.M.A., *Guides*.

On February 9, 2016 OWCP forwarded a statement of accepted facts and the case file to the district medical adviser (DMA) for review. In a February 20, 2016 report, Dr. Jovito Estaris, a DMA and Board-certified preventive medicine/occupational environmental medicine specialist, reviewed the medical record, including Dr. Watkins Campbell's report. He indicated that Dr. Watkins Campbell's use of a grade 2 physical examination modifier was inconsistent with the objective findings as she had not documented a sublaxable shoulder or laxity for the left shoulder. Thus, Dr. Estaris provided a grade 1 modifier for physical examination. Under the A.M.A., *Guides*, he determined that appellant had four percent left upper extremity permanent impairment under the DBI method for a full thickness rotator cuff tear.

By decision dated April 7, 2016, OWCP granted appellant a schedule award for four percent permanent impairment of the left upper extremity, for a total of 12.48 weeks, to run from October 9, 2013 to January 4, 2014.

On April 14, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on December 15, 2016. During the hearing, counsel noted the Board's case of *T.H.*, Docket No. 14-0943 (issued November 25, 2016),⁶ but indicated that the only issue between DMA and Dr. Watkins Campbell concerned the use of a grade modifier. A copy of the Board's decision of *T.H.* was submitted to the record.

⁶ 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 range of motion (ROM) methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. 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.

By decision dated February 24, 2017, an OWCP hearing representative affirmed the April 7, 2016 OWCP decision. The hearing representative accorded the weight of the medical evidence to the report of the DMA, as he was considered the expert in the application of the A.M.A., *Guides*.

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, Office of Workers' Compensation Programs.⁷ 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.⁸ 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.⁹

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.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹⁰ 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.¹¹

ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish greater than four percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

⁷ See 20 C.F.R. §§ 1.1-1.4.

⁸ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁹ 20 C.F.R. § 10.404; *see also* Ronald R. Kraynak, 53 ECAB 130 (2001).

¹⁰ 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 (February 2013).

¹¹ *Isidoro Rivera*, 12 ECAB 348 (1961).

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.¹² The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹³ 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.¹⁴ 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.¹⁵

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 May 1, 2017 decision.¹⁶ Utilizing a consistent method for calculating permanent impairment for upper extremities to be applied uniformly,¹⁷ and 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.¹⁸

CONCLUSION

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

¹² *Supra* note 6.

¹³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁴ *See supra* note 12.

¹⁵ *Id.*

¹⁶ *See E.S.*, Docket No. 17-0869 (issued August 14, 2017).

¹⁷ *See FECA Bulletin No. 17-06* (issued May 8, 2017); *B.L.*, Docket No. 17-1970 (issued April 19, 2018).

¹⁸ *R.S.*, Docket No. 17-1783 (issued January 12, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: June 6, 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