United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 17-0114**
	)	**Issued: March 7, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Gainesville, GA, Employer	)	

Appearances:
Anthony Arenas, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 25, 2016 appellant, through counsel, filed a timely appeal from two decisions of the Office of Workers' Compensation Programs (OWCP) dated September 16, 2016. Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has more than 24 percent impairment of his left upper extremity and 17 percent permanent impairment of his right upper extremity for which he 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

This case has previously been before the Board.[3] The Board notes that appellant has filed three claims in this case. Under OWCP File No. xxxxxx344, by decision dated August 11, 2016, the Board set aside OWCP's March 20, 2015 decision for two percent permanent impairment. The facts and circumstances of the prior appeal are incorporated herein by reference. The relevant facts follow.

On July 7, 2000 appellant, a 45-year-old letter carrier, injured his right shoulder when he bumped into unattended equipment. He filed a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx743, which OWCP accepted for right rotator cuff tear.

Appellant underwent right rotator cuff repair surgery on October 10, 2000. On January 15, 2008 OWCP expanded the claim to include the condition of right shoulder tendinitis.

On September 27, 2012 appellant injured his left shoulder while trying to lift the rear door of his mail vehicle. He filed a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx365, which OWCP accepted for sprain of the left shoulder and left upper arm.

Appellant underwent left shoulder surgery on March 25, 2013, a procedure for left shoulder arthroscopy with subacromial decompression, distal clavicle resection, and debridement of labrum, biceps, and partial-thickness rotator cuff tear.

On October 31, 2012 appellant filed an occupational disease claim (Form CA-2), under OWCP File No. xxxxxx344, alleging that he developed a bilateral carpal tunnel condition causally related to employment factors. He filed a claim for benefits, which OWCP accepted for bilateral carpal tunnel syndrome and lesion of left ulnar nerve/cubital tunnel. OWCP administratively combined the three claims under File No. xxxxxx743.

By decision dated June 19, 2001, OWCP awarded appellant a schedule award for three percent permanent impairment of the right arm for 9.36 weeks, covering the period May 15 to July 19, 2001.

On May 21, 2007 appellant filed a claim for an additional schedule award (Form CA-7) based on permanent impairment of his right upper extremity.

By decision dated June 5, 2007, OWCP granted appellant a schedule award for an additional 10 percent permanent impairment of the right upper extremity for 9.36 weeks, covering the period May 15 to July 19, 2001.

On January 23, 2008 appellant filed a claim for an additional schedule award (Form CA-7) based on permanent impairment of his right upper extremity.

By decision dated July 23, 2008, OWCP awarded appellant a schedule award for two percent permanent impairment of the right upper extremity for 6.24 weeks, covering the period June 10 to July 23, 2008.

[3] Docket No. 15-1444 (issued August 11, 2016).

On January 8, 2014 the claimant underwent surgery, a right shoulder arthroscopy procedure for repair and debridement of recurrent labral tear.

On December 15, 2014 appellant filed a claim for a schedule award (Form CA-7) based on permanent impairment of his bilateral upper extremities.

In an October 15, 2014 report, Dr. Samy F. Bishai, a specialist in orthopedic surgery, reported that appellant had 31 percent permanent impairment of the right upper extremity and 34 percent permanent impairment of the left upper extremity under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (A.M.A., *Guides*).[4] He based this rating on the combined rating for 24 percent impairment for the right shoulder and 9 percent impairment for her right carpal tunnel syndrome. Dr. Bishai advised that on examination of the right wrist, hand, and forearm appellant had diminished sensation in the distribution of the median nerve with diminished sensation in the right thumb, index, and middle fingers of the right hand. Appellant had a positive Tinel's sign and Phalen's test on the right side, with weakness in his right hand grip. Dr. Bishai noted that the results of a nerve conduction velocity study of the upper extremities, that appellant underwent on October 13, 2014, showed that he had right-sided carpal tunnel syndrome affecting the sensory components of the median nerve.

Dr. Bishai calculated the impairment rating for the accepted diagnosis of right carpal tunnel syndrome by relying on Table 15-23 at page 449.[5] He found that under the heading of "Test Findings" appellant had a grade modifier of 2, for motor conduction block; under the heading of "History", he rated a grade modifier of 3, based on constant symptoms; and under the heading of "Physical Findings" he found that appellant's physical examination yielded a grade modifier of 3 for atrophy or weakness. Pursuant to the rating process set forth at page 448,[6] he determined that the average value for these modifiers, based on adding 2 plus 3 plus 3, divided by 3, equaled 2.66, which he rounded up to 3; this produced a mid-range impairment of 5 under Table 15-23. Given that appellant's *Quick*DASH test score was 90, Dr. Bishai found that this yielded a mild grade modifier of 3, which produced nine percent permanent impairment rating for right carpal tunnel syndrome.

With regard to appellant's right shoulder, Dr. Bishai found that appellant had 24 percent right upper extremity impairment and 24 percent left upper extremity impairment stemming from his accepted bilateral shoulder joint conditions, pursuant to the A.M.A., *Guides*. Using the stand alone range of motion (ROM) method of impairment calculation, Dr. Bishai utilized Table 15-34, page 475 of the A.M.A., *Guides*,[7] and based his rating for the right shoulder on the following calculations: flexion of 70 degrees, which yielded a grade 2, nine percent upper extremity impairment; extension of 10 degrees, which yielded a grade 2, two percent upper extremity impairment; abduction of 70 degrees, which yielded a grade 2, six percent upper extremity impairment; adduction of 15 degrees, which yielded a grade 1, one percent upper extremity

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

[5] *Id*. at 449.

[6] *Id*. at 448.

[7] *Id*. at 475.

impairment; internal rotation of 20 degrees, which yielded a grade 2, four percent upper extremity impairment; and external rotation of 45 degrees, which yielded a grade 1, two percent upper extremity impairment. Dr. Bishai added these deficits, as they were for "one joint," for a total 24 percent right upper extremity permanent impairment.

With regard to the left shoulder, Dr. Bishai rendered the following calculations: flexion of 80 degrees, which yielded nine percent upper extremity impairment; extension of 10 degrees, which yielded two percent upper extremity impairment; abduction of 80 degrees, which yielded six percent upper extremity impairment; adduction of 15 degrees, which yielded one percent upper extremity impairment; internal rotation of 20 degrees, which yielded four percent upper extremity impairment; and external rotation of 45 degrees, which yielded two percent upper extremity impairment. Dr. Bishai added these deficits for a total 24 percent left upper extremity permanent impairment.

With regard to left ulnar nerve entrapment of the left elbow, Dr. Bishai found that appellant had five percent impairment. He found that appellant had a grade modifier of two for test findings; a grade modifier of three for functional history; and a grade modifier of three for physical findings. Dr. Bishai calculated a *Quick*DASH score of 98 and calculated functional scale of three, which yielded nine percent upper extremity permanent impairment. He advised that, as appellant had two entrapped nerves, the median and the ulnar nerve in the left upper extremity, the second nerve impairment should be one half of the first entrapment, pursuant to the A.M.A., *Guides*. Dr. Bishai noted that the first entrapped nerve, the median nerve, would yield 9 percent impairment; as the second impairment would be for the ulnar nerve entrapment and it could be only 50 percent of the value of 9 percent. Based on this calculation, he concluded that appellant had five percent left upper extremity impairment for left ulnar nerve entrapment of the left elbow.

Dr. Bishai combined the impairments for the left shoulder, left carpal tunnel syndrome and left ulnar nerve entrapment of the left elbow for 34 percent total left upper extremity permanent impairment.

In a report dated December 29, 2014, an OWCP medical adviser found under File No. xxxxxx344 that appellant had an additional two percent permanent impairment of his right upper extremity for right-sided carpal tunnel syndrome pursuant to the A.M.A., *Guides*. He noted that appellant had tingling, numbness, and pain in hands and noted that EMG studies confirmed bilateral carpal tunnel syndrome of moderate severity, which yielded grade 2 impairment. Based on Table 15-23, page 449 of the A.M.A., *Guides*,[8] OWCP's medical adviser found that his impairment yielded a grade modifier of 1 for test findings, applied with a default of two percent upper extremity permanent impairment.

In a report dated December 29, 2014, the same OWCP medical adviser found under File No. xxxxxx743 that appellant's right shoulder had stabilized and did not warrant an additional impairment rating.

[8] *Id*. at 449.

By decision dated March 20, 2015, OWCP granted appellant a schedule award under File No. xxxxxx344 for an additional two percent permanent impairment of the right arm for 9.36 weeks, covering the period March 9 to April 24, 2013.

By decision dated March 25, 2015, OWCP granted appellant a schedule award under File No. xxxxxx365 for 13 percent permanent impairment of the left arm for 40.56 weeks, covering the period October 15, 2014 to July 25, 2015.

By decision dated April 3, 2015, OWCP denied appellant's claim under File No. xxxxxx743 for an additional schedule award for the left and right upper extremities.

On June 9, 2015 appellant, through his representative, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review under File No. xxxxxx743. The hearing was held on November 16, 2015.

By decision dated February 1, 2016, OWCP's hearing representative set aside the April 3, 2015 decision. He found that OWCP's medical adviser failed to discuss Dr. Bishai's report in any detail and did not accept his examination findings; thus OWCP erred in finding that his report represented the weight of medical evidence. OWCP's hearing representative therefore remanded the case to the district office and directed it to refer the case to a second opinion physician and instructed OWCP to have the second opinion examiner to review the record, including Dr. Bishai's report, and determine the proper degree of impairment of the left and right upper extremities under the A.M.A., *Guides* based on all of appellant's accepted conditions.

In a second opinion report dated March 24, 2016, Dr. Eric S. Furie, Board-certified in orthopedic surgery, found that appellant had 13 percent permanent right upper extremity impairment and 16 percent permanent left upper extremity impairment under the A.M.A., *Guides*. He derived this rating by finding initially that appellant had a class 1 impairment stemming from his bilateral shoulder condition. Dr. Furie found that he had 12 percent bilateral upper extremity impairment acromioclavicular joint disease, status post distal clavicle resection, under Table 15-5 of the A.M.A., *Guides*. He then added four percent impairment for appellant's neurologic impairment of the left hand, and one percent impairment for the right hand, which he found had less symptomatology and fewer findings, under Table 15-21 and 15-23 of the A.M.A., *Guides*.

Dr. Furie reviewed Dr. Bishai's October 15, 2014 report, which based bilateral shoulder impairment on ROM deficit, and found that he significantly exaggerated appellant's upper extremity impairment for the left and right shoulders.

In a supplemental report dated June 29, 2016, Dr. Furie found that appellant had four percent permanent impairment for left carpal tunnel syndrome and two percent permanent impairment for right carpal tunnel syndrome pursuant to Table 15-21 and 15-23 at page 449 of the A.M.A., *Guides*.

In a July 31, 2016 report, Dr. Arnold T. Berman, a Board-certified surgeon and OWCP's medical adviser, found under File No. xxxxxx344 that appellant had no additional impairment due to his accepted conditions and was not entitled to an increase in his schedule award.

Appellant appealed to the Board. By decision dated August 11, 2016, the Board set aside OWCP's March 20, 2015 decision under File No. xxxxxx344. The Board found that the December 29, 2014 impairment rating of OWCP's medical adviser was not rendered in conformance with the applicable protocols and tables of the sixth edition of the A.M.A., *Guides*, as he only calculated a grade modifier for test findings based on an EMG study showing moderate carpal tunnel, but failed to evaluate the categories of history and physical findings. The Board therefore set aside OWCP's March 20, 2015 decision and remanded the case for clarification from OWCP's medical adviser as to whether appellant had additional impairment of his right upper extremity related to his right carpal tunnel syndrome.[9]

In an August 20, 2016 report, Dr. Berman found under File No. xxxxxx743 that appellant had no more than 24 percent permanent impairment of the left upper extremity causally related to his accepted conditions. He noted that the left shoulder calculations submitted by Dr. Bishai and Dr. Furie were incorrect because they used the ROM calculation rather than the diagnosis-based impairment (DBI) methodology calculation "required" by the A.M.A., *Guides*. Dr. Berman found that appellant had 12 percent left upper extremity impairment for the left shoulder; 9 percent left upper extremity impairment for left carpal tunnel syndrome; and 5 percent impairment for left cubital tunnel syndrome, ulnar nerve entrapment at the elbow, which totaled 24 percent permanent left upper extremity impairment under the A.M.A., *Guides*.

By decision dated September 16, 2016, OWCP granted appellant a schedule award under File No. xxxxxx365 for an additional 11 percent permanent impairment of the left upper extremity for 34.32 weeks, covering the period March 24 to November 19, 2016, which amounted to a total 24 percent permanent impairment of the left upper extremity. It found that Dr. Furie incorrectly applied the A.M.A., *Guides* by using the ROM calculation method for rating impairment. OWCP further noted that Dr. Furie did not include impairment for left ulnar nerve cubital tunnel syndrome.

By decision dated September 16, 2016, under File No. xxxxxx743, found appellant has no more than 24 percent permanent impairment of his right upper extremity causally related to his accepted conditions.

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.[10] 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.[11] 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

[9] *Supra* note 3. The Board did not consider Dr. Berman's July 31, 2016 report in this decision.

[10] *See* 20 C.F.R. § 1.1-1.4.

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

implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[12]

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).[13] 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.[14]

ANALYSIS

The issue on appeal is whether appellant has more than 24 percent permanent impairment of his left upper extremity and 17 percent permanent impairment of his right upper extremity causally related to his accepted bilateral shoulder, left carpal tunnel syndrome, and left ulnar nerve entrapment conditions, for which he previously received schedule awards.

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

The Board has found that OWCP 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.[15] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[16] 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. Because OWCP's own physicians were inconsistent in the application of the

[12] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[13] *See* 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).

[14] *Isidoro Rivera*, 12 ECAB 348 (1961).

[15] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

[16] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[17]

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 September 16, 2016 decisions. Utilizing a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, 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 this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2016 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further action consistent with this decision.[19]

Issued: March 7, 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

[17] *Supra* note 16.

[18] FECA Bulletin No. 17-06 (issued May 8, 2017).

[19] The Board notes that OWCP issued separate schedule award decisions for appellant's left and right upper extremity impairments, under different claims, in this case. For purposes of clarity and judicial economy, the Board instructs OWCP on remand to issue one decision and make all findings under one claim and one case number.