United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 17-0130**
	)	**Issued: March 5, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 27, 2016 appellant, through counsel, filed a timely appeal from a June 30, 2016 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 eight percent permanent impairment of the left upper extremity, for which she previously received a schedule award.[3]

FACTUAL HISTORY

On April 27, 2011 appellant, then a 50-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome as a result of her federal employment. She submitted a letter on May 31, 2011 indicating that she had worked on letter sorting machines from 1979 to 1989 and then worked on registered mail. Appellant reported that she had numbness and pain in her hands, wrists, and arms.

An attending osteopath, Dr. Daniel DePrince III, submitted a June 15, 2011 report providing results on examination. The diagnoses included cervical strain radiculopathy, cervical neuritis, carpal tunnel syndrome, cubital tunnel syndrome, and thoracic outlet syndrome. Dr. DePrince opined that appellant's conditions were causally related to her federal employment.

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome on July 28, 2011. Appellant worked light duty and did not receive wage-loss compensation. In a letter dated January 20, 2012 she, through counsel, requested that OWCP expand the accepted conditions to include C5-6 radiculopathy/radiculitis. Counsel also submitted an April 18, 2012 letter requesting the C5-6 cervical radiculopathy be included as an accepted condition.

On October 22, 2012 appellant submitted a July 13, 2012 report from Dr. Arthur Becan, a Board-certified orthopedic surgeon.[4] Dr. Becan provided a history and results on examination.[5] He opined that appellant had 14 percent permanent impairment to each upper extremity. The left upper extremity permanent impairment was based on sensory deficit in the C6 and C7 nerve roots, and left median nerve entrapment.

OWCP prepared a statement of accepted facts (SOAF) dated March 4, 2013 and referred the case to an OWCP medical adviser, Dr. Henry Magliato. In a report dated March 5, 2013, Dr. Magliato wrote that he would accept 14 percent for the left upper extremity permanent impairment. He noted that the physical examination description included an obvious error regarding appellant's age and gender. On April 24, 2013 appellant submitted a corrected copy of the July 13, 2012 report.

On August 27, 2014 appellant submitted a June 24, 2014 report from Dr. Becan. He provided a history and results on examination. Dr. Becan opined, with respect to the left upper extremity, that appellant had 19 percent permanent impairment. The physician reported that appellant had left median nerve entrapment neuropathy (eight percent upper extremity permanent

[3] Counsel has indicated on appeal that he is not contesting the right upper extremity permanent impairment determination.

[4] An incomplete copy of the report was originally submitted on September 4, 2012.

[5] The physical examination results erroneously refer to appellant as a 28-year-old male.

impairment), C6 nerve root sensory deficit (six percent), C5 nerve root sensory deficit (four percent), and C7 nerve root sensory deficit (three percent). Dr. Becan also opined that appellant had 32 percent right upper extremity permanent impairment. The record contains a brief note dated August 28, 2014 from Dr. Garo Avetian, an osteopath, opining that he agreed with Dr. Becan with respect to appellant's upper extremity permanent impairments.

OWCP prepared a SOAF dated December 12, 2014 and referred the case to Dr. Magliato for review. The accepted condition was enumerated as carpal tunnel syndrome. In a report dated December 23, 2014, Dr. Magliato wrote that the C5-7 nerve roots overlap the median nerve distribution. He indicated that Dr. Becan should clarify his report or, if the physician could not clarify, then a second opinion examination was warranted.

In a letter to appellant dated March 31, 2015, OWCP noted the findings of Dr. Magliato and indicated that appellant should submit an additional report from Dr. Becan within 30 days. On June 30, 2015 appellant submitted a June 22, 2015 report from Dr. Becan. Dr. Becan indicated that he agreed with OWCP's medical adviser that the C6 and C7 nerve roots could be incorporated into median nerve sensory deficit. He wrote that the C5 nerve root was tested in the upper arm by the deltoid region and not distally therefore it was differentiated from a distal sensory deficit in the median nerve distribution. Dr. Becan opined that appellant had 12 percent left upper extremity permanent impairment, based on 8 percent for left median nerve entrapment neuropathy and 4 percent for left C5 nerve root sensory deficit. He also opined that appellant had 25 percent right upper extremity permanent impairment. The right upper extremity permanent impairment included C5 sensory and motor deficits and C6 motor deficits.

A new and updated SOAF dated July 8, 2015 was prepared and the case referred again to Dr. Magliato. In a report dated September 1, 2015, Dr. Magliato opined that appellant had eight percent left upper extremity permanent impairment. He opined that the four percent for the C5 nerve root was not appropriate. The medical adviser noted that the C5 nerve root was also covered by the median nerve and unlike the right upper extremity no motor impairment had been found on the left. For the right upper extremity, he found that the permanent impairment was 25 percent.

By decision dated January 13, 2016, OWCP issued a schedule award for 8 percent permanent impairment of the left upper extremity and 25 percent permanent impairment of the right upper extremity. The period of the award was 102.96 weeks from June 22, 2015.

On January 20, 2016 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on April 11, 2016. Counsel argued that there was a conflict in the medical evidence with respect to the left upper extremity. He also indicated that he was not contesting the right upper extremity award.

By decision dated June 30, 2016, the hearing representative affirmed the January 13, 2016 decision. The hearing representative found OWCP's medical adviser represented the weight of the medical evidence.

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 FECA program with the Director of OWCP.[6] 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.[7] 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 sixth edition American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[8]

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, [s]ixth [e]dition, [A.M.A.,] *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).[9] 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.[10]

FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.[11]

ANALYSIS

OWCP issued appellant a schedule award for eight percent permanent impairment to the left upper extremity. The accepted condition in the case is bilateral carpal tunnel syndrome, however, only the left upper extremity permanent impairment is contested. The eight percent

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[6] *See* 20 C.F.R. §§ 1.1-1.4.

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

[8] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[9] *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.(6)a (February 2013).

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

[11] 5 U.S.C. § 8123(a).

permanent impairment was based on application of Table 15-23 of the A.M.A., *Guides.*[12] It is well established that Table 15-23 is the proper table for evaluating carpal tunnel syndrome.[13]

OWCP referred the case to an OWCP medical adviser the review to medical evidence from Dr. Becan. In his September 1, 2015 report, the medical adviser opined that the sensory deficit of the left C5 root could be covered by the median nerve which also contains fibers from the C5 sensory portion. The attending physician had found that the left upper extremity permanent impairment was 12 percent. The permanent impairment included eight percent based on entrapment neuropathy, and four percent for a C5 sensory deficit under *The Guides Newsletter* for peripheral neuropathies.[14]

The medical adviser, Dr. Magliato, and the attending physician, Dr. Becan, disagreed as to whether the C5 sensory deficit impairment was appropriate in this case. Dr. Magliato opined that the C5 was covered by the median nerve impairment, and no left upper extremity motor impairment was found. Dr. Becan addressed the issue in his June 22, 2015 report. He opined that the C5 nerve root impairment was differentiated from the median nerve distribution. Dr. Becan reiterated that an additional four percent was appropriate for the C5 sensory deficit.

The record therefore contains a disagreement between an attending physician and an OWCP physician as to the issue of the extent of left upper extremity permanent impairment. FECA's implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[15]

The case will be remanded for referral to a referee physician to resolve the contested issue. To properly resolve the issue, the referee should first address whether there are any left upper extremity conditions other than carpal tunnel syndrome casually related to appellant's federal employment.[16] The referee should provide a reasoned opinion as to the employment-related left upper extremity permanent impairment under the A.M.A., *Guides*. After such further development as is necessary, OWCP should issue an appropriate decision.

CONCLUSION

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

[12] A.M.A., *Guides* 449, Table 15-23.

[13] *See E.M.*, Docket No. 14-0795 (issued January 9, 2015).

[14] For peripheral nerve impairments to the upper or lower extremities, OWCP procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment Using the [s]ixth [e]dition" (July/August 2009) is to be applied. *See G.N.*, Docket No. 10-0850 (issued November 12, 2010).

[15] 20 C.F.R. § 10.321 (1999).

[16] Counsel had requested expansion of the claim in 2012 to include cervical radiculopathy, but there is no indication OWCP developed the issue or formally accepted or denied expansion.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 30, 2016 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: March 5, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board