United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 17-0375**
	)	**Issued: May 7, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Brunswick, 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 December 9, 2016 appellant, through counsel, filed a timely appeal from an October 14, 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 met her burden of proof to establish more than six percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On May 13, 2004 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1), under OWCP File No. xxxxxx073, alleging that, on May 13, 2004, she sustained a right shoulder injury due to reaching into a mailbox at work. She stopped work on May 13, 2004 and returned to limited-duty work on May 14, 2004 without wage loss. OWCP accepted appellant's traumatic injury claim for right shoulder sprain/strain and complete rupture of the rotator cuff of her right shoulder.

Appellant stopped work on September 26, 2005 and, on that date, she underwent OWCP-authorized right shoulder surgery, including diagnostic arthroscopy with debridement and mini-open rotator cuff repair. On March 20, 2006 she returned to limited-duty work on a full-time basis without wage loss.[3]

On March 13, 2013 appellant filed an occupational disease claim (Form CA-2), under OWCP File No. xxxxxx469, alleging that she sustained a right shoulder injury due to performing her federal employment duties. She indicated that she first realized on November 1, 2012 that her claimed condition was caused or aggravated by factors of her federal employment. Appellant stopped work on March 1, 2013 and returned to work shortly thereafter. OWCP accepted appellant's occupational disease claim for rotator cuff tear of her right shoulder. It administratively combined appellant's traumatic injury and occupational disease claims and designated OWCP File No. xxxxxx073 as the master file.

Appellant stopped work on May 17, 2013 and received disability compensation on the daily rolls beginning that same date.

The findings of a May 30, 2013 magnetic resonance imaging (MRI) scan of appellant's right shoulder showed a full-thickness supraspinatus tear, biceps tendinosis, and infrascapular/subscapular tendinosis.

On August 1, 2013 appellant underwent OWCP-approved right shoulder surgery, including arthroscopic subacromial decompression with rotator cuff repair.[4]

The findings of January 6, 2014 x-ray testing of appellant's right shoulder revealed moderate degenerative changes of her acromioclavicular joint with some inferior spurring.

[3] Appellant received disability compensation on the daily rolls for her time off from work due to the surgery.

[4] Appellant received disability compensation on the periodic rolls beginning September 22, 2013.

On June 18, 2015 appellant filed a claim for a schedule award (Form CA-7) alleging permanent impairment due to her accepted work injury.

In a June 26, 2015 development letter, OWCP requested that appellant submit a medical report addressing whether her injury-related condition had reached maximum medical improvement (MMI) and containing a permanent impairment rating in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] OWCP afforded appellant 30 days to respond.

Appellant submitted a December 12, 2014 report from Dr. Catherine Watkins Campbell, an attending physician Board-certified in occupational and family medicine, who examined her on October 13, 2014. Dr. Watkins Campbell indicated that, upon examination, appellant exhibited the following measurements for active range of motion (ROM) of her right shoulder (three attempts for each motion): 160, 167, and 167 degrees of abduction; 32, 28, and 26 degrees of adduction; 153, 151, and 156 degrees of flexion; 62, 60, and 59 degrees of extension; 76, 70, and 76 degrees of internal rotation; and 98, 96, and 96 degrees of external rotation. Appellant had mild-to-moderate glenohumeral tenderness of her right shoulder on palpation and mild anterior-posterior laxity of her right shoulder with pain on testing. Dr. Watkins Campbell opined that appellant had 12 percent permanent impairment of her right upper extremity impairment under the sixth edition of the A.M.A., *Guides*. She applied the diagnosis-based impairment (DBI) method of rating permanent impairment under Table 15-5 (Shoulder Regional Grid) on page 403. Dr. Watkins Campbell determined that appellant's most impairing right shoulder diagnosis was her right shoulder distal acromioplasty, and she found that this grade 1 condition yielded a default value of 10 percent permanent impairment of the right upper extremity. She further determined that appellant had a functional history grade modifier of 3 (based on a *Quick*DASH [Disabilities of the Arm, Shoulder, and Hand] score of 68), and a physical examination grade modifier of 1 (based on mild range of motion deficits and mild instability findings). Dr. Watkins Campbell noted that the clinical studies grade modifier was not applicable because no clinical studies were utilized. She indicated that application of the net adjustment formula required movement two spaces to the right of the 10 percent permanent impairment default value on page 403. Therefore, appellant had a total right upper extremity permanent impairment of 12 percent.[6]

OWCP referred appellant's case to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, and requested that he review the medical evidence of record, including the December 12, 2014 report of Dr. Watkins Campbell. It requested that Dr. Slutsky provide an opinion regarding appellant's right shoulder permanent impairment under the sixth edition of the A.M.A., *Guides.*

In a report dated September 20, 2015, Dr. Slutsky applied the DBI method of rating permanent impairment under Table 15-5 (Shoulder Regional Grid) on page 403.[7] He determined

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

[6] Dr. Watkins-Campbell found that appellant had reached MMI as of September 24, 2014.

[7] Dr. Slutsky indicated that, under the sixth edition of the A.M.A., *Guides*, the DBI method of rating permanent impairment was preferred over the ROM method.

that appellant's most impairing diagnosis was the full-thickness right rotator cuff tear of her right shoulder with residual dysfunction. Dr. Slutsky opined that Dr. Watkins Campbell erred by using a diagnosis (distal acromioplasty) which did not exist in the sixth edition of the A.M.A., *Guides*. He found that appellant's right rotator cuff tear (grade 1) yielded a default value of five percent permanent impairment of the right upper extremity. Dr. Slutsky asserted that Dr. Watkins Campbell's functional history grade modifier of 3 was unreliable because it differed by 2 or more grades from the score for the physical examination grade modifier or the clinical studies grade modifier. Therefore, a functional history grade modifier would not be used in the case. Dr. Slutsky further determined that appellant had a physical examination grade modifier of 1 (based on tenderness on palpation and ROM findings for the right shoulder).[8] He also noted that appellant had a clinical studies grade modifier of 2 based on the right shoulder findings seen in a May 30, 2013 MRI scan and a January 6, 2014 x-ray test. Dr. Slutsky indicated that application of the net adjustment formula required movement one space to the right of the five percent permanent impairment default value on page 403. Therefore, appellant had a total right upper extremity permanent impairment of six percent.[9]

By decision dated December 30, 2015, OWCP granted appellant a schedule award for six percent permanent impairment of her right upper extremity. The award ran for 18.72 weeks from October 13, 2014 to February 21, 2015 and was based on the permanent impairment rating of Dr. Slutsky.

On January 20, 2016 appellant, through counsel, requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing, held on August 30, 2016, counsel argued that Dr. Watkins-Campbell properly determined that appellant had 12 percent permanent impairment of her right upper extremity. He asserted that Dr. Watkins Campbell correctly applied the DBI method of rating permanent impairment by using the diagnosis of status post distal acromioplasty because this diagnosis is essentially the same as status post distal clavicle resection, a diagnosis found on Table 15-5 of the sixth edition of the A.M.A., *Guides*. Counsel also argued that Dr. Watkins Campbell properly calculated the grade modifiers.

By decision dated October 14, 2016, OWCP's hearing representative affirmed OWCP's December 30, 2015 decision, noting that Dr. Slutsky properly calculated appellant's right shoulder permanent impairment and that the medical evidence of record failed to show that appellant has more than six percent permanent impairment of her right upper extremity.

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

[8] Dr. Slutsky indicated that application of appellant's right shoulder ROM findings to Table 15-35 on page 477 showed that appellant's ROM findings were consistent with a physical examination grade modifier of 1.

[9] Dr. Slutsky found that appellant had reached MMI as of October 13, 2014, the date of Dr. Watkins Campbell's examination.

[10] *See* 20 C.F.R. §§ 1.1-1.4.

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 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 met her burden of proof to establish more than six percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

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

The Board has found that OWCP has 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

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

[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 (March 2017).

[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).

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 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 October 14, 2016 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, 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.[18]

CONCLUSION

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

[17] *Supra* note 15.

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

ORDER

IT IS HEREBY ORDERED THAT the October 14, 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: May 7, 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