United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 17-0586**
	)	**Issued: May 2, 2018**
DEPARTMENT OF THE ARMY, RESEARCH, DEVELOPMENT & ENGINEERING COMMAND, Picatinny Arsenal, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 24, 2017 appellant, through counsel, filed a timely appeal from a September 16, 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 met her burden of proof to establish more than 12 percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On December 23, 2013 appellant, then a 65-year-old program support specialist, filed a traumatic injury claim (Form CA-1) alleging a left wrist fracture that she attributed to a December 20, 2013 work-related slip and fall.[3] OWCP initially accepted the claim for minimally displaced distal radius and ulnar styloid fractures. It later expanded the acceptance of the claim to include left carpal tunnel syndrome (CTS). On September 15, 2014 appellant underwent a left carpal tunnel release performed by Dr. Ross J. Fox, a Board-certified orthopedic surgeon.[4]

In a November 28, 2014 report, Dr. Fox diagnosed CTS and closed Colles' fracture. He indicated that appellant had reached maximum medical improvement (MMI). On physical examination, Dr. Fox noted that her left hand and wrist revealed no overt deformity. He also noted that there was no frank swelling or erythema, and no lymphadenopathy. Dr. Fox further noted that, capillary refill was brisk and gross sensation was intact, although there was subjective numbness in the tips of the fingers. Appellant's range of motion (ROM) was approximately 75 to 80 percent composite, which was consistent with her underlying Sjögren's syndrome. Dr. Fox also reported that wrist ROM was approximately 60 degrees of flexion and 60 degrees of extension. Appellant's grip strength averaged approximately 13 kilogram (kg) on the right compared to 8 kg on the left. Lastly, Dr. Fox noted that appellant's joints were grossly stable and that her carpal tunnel incision wound was well healed. In conclusion, he noted that overall appellant was doing reasonably well and she had reached MMI. Dr. Fox explained that all she suffered from was some pain and weakness, which he believed was permanent. He released appellant to do all activity without restriction.

On March 17, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated March 31, 2015, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] It afforded her 30 days to submit the necessary evidence.

[3] The Form CA-1 indicated that appellant slipped in the hallway of Building 163. Emergency room treatment records from December 20, 2013 indicated that appellant was at work earlier that morning when she slipped on a wet floor and fell on her outstretched left arm.

[4] OWCP authorized appellant's September 15, 2014 left wrist surgery.

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

In response, appellant resubmitted various medical reports and diagnostic studies that predated her September 2014 left wrist surgery. She also resubmitted Dr. Fox's November 28, 2014 report.

By decision dated July 22, 2015, OWCP denied appellant's claim for a schedule award. It noted that it had not received an impairment rating from appellant's physician as previously requested. Thus, OWCP found that the medical evidence of record failed to demonstrate a measurable impairment.

Appellant, through counsel, timely requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on November 20, 2015.

Post-hearing, counsel submitted a November 11, 2015 impairment rating from Dr. Nicholas P. Diamond, a physiatrist and pain management specialist. Dr. Diamond's diagnoses included: (1) left wrist post-traumatic impacted distal radial fracture; (2) left wrist post-traumatic nondisplaced ulnar styloid fracture; (3) status post closed reduction of the left wrist fracture; (4) post-traumatic degenerative joint disease with dorsal angulation of healed left wrist radial fracture; (5) post-traumatic left CTS; and (6) status post left carpal tunnel release. He also diagnosed aggravation of preexisting left upper extremity polyarthralgia involving the hands and phalanges, with history of osteoarthritis and Raynaud's phenomenon. Dr. Diamond advised that appellant reached MMI on November 11, 2015.

With respect to appellant's left CTS, Dr. Diamond found nine percent upper extremity permanent impairment due to entrapment neuropathy of the left median nerve at the wrist.[6] He also found an additional seven percent upper extremity impairment due to left wrist ROM deficits.[7] Dr. Diamond then calculated ROM deficits for the left index, long, ring, and little fingers. His rating included loss of flexion at both the proximal and distal interphalangeal joints of each of appellant's four fingers.[8] Dr. Diamond converted the respective digit impairments to a total hand impairment 32 percent, which he then converted to an upper extremity impairment 29 percent. After combining the upper extremity impairments due to CTS 9 percent, wrist ROM deficits 7 percent, and various finger ROM deficits 29 percent, he found 40 percent permanent impairment of the left upper extremity.

By decision dated January 20, 2016, the hearing representative vacated the July 22, 2015 decision, and remanded the case for OWCP to refer Dr. Diamond's November 11, 2015 impairment rating report to a district medical adviser (DMA).

On remand, OWCP prepared a January 29, 2016 statement of accepted facts and forwarded the case record, including Dr. Diamond's impairment rating report, to its DMA, Dr. Morley Slutsky, a Board-certified occupational medicine physician.

[6] *Id.* at 449, Table 15-23.

[7] *Id.* at 473, Table 15-32.

[8] *Id.* at 470, Table 15-31.

In a February 3, 2016 report, Dr. Slutsky found a combined 12 percent left upper extremity permanent impairment. He essentially concurred with Dr. Diamond's nine percent rating for left CTS. However, Dr. Slutsky disagreed with the ROM-based impairment ratings for the left wrist and fingers. With respect to the finger/hand ROM deficits, he commented that none of appellant's treating physicians observed finger deficits. Dr. Slutsky also noted that there were no accepted finger conditions under the current claim. Regarding impairment due to appellant's accepted left wrist fracture, he rated her under the diagnosis-based impairment (DBI) methodology rather than the ROM method employed by Dr. Diamond. Dr. Slutsky indicated that ROM was the "less preferred method" for rating permanent impairment and noted that Dr. Diamond's examination findings were inconsistent with other physicians who observed near normal wrist ROM. He related that, according to Chapter 15 of the A.M.A., *Guides,* ROM may only be used in special circumstances when no other methods for rating impairment are available and principally as a factor in the adjustment grid. Dr. Slutsky indicated that, according to Table 15-3,[9] appellant had one percent impairment for her left wrist fracture. He assigned a grade modifier for physical examination[10] due to tenderness to palpation with crepitation and none for clinical studies[11] or functional history,[12] for a net adjustment of zero. Dr. Slutsky reported that appellant had a total of three percent permanent impairment for her accepted left wrist fracture. He then combined the impairments due to wrist fracture (3 percent) and CTS (9 percent), and found a total left upper extremity permanent impairment of 12 percent. Dr. Slutsky noted a date of MMI of November 11, 2015.

On March 1, 2016 OWCP granted appellant a schedule award for 12 percent permanent impairment of the left upper extremity. The date of MMI was noted as November 11, 2015. OWCP found that the weight of the medical evidence rested with Dr. Slutsky, serving as OWCP's DMA, who correctly applied the A.M.A., *Guides* to the examination findings.

On March 7, 2016 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. During the July 12, 2016 hearing, counsel argued that appellant suffered from five preexisting conditions, including lupus, fibromyalgia, Sjögren's disease, Raynaud's disease, and osteoarthritis. He explained that these conditions limited her left arm, fingers, and wrist, including deformities due to her osteoarthritis and lupus and neurologic deficiencies in her hand due to her autoimmune diseases. Counsel noted that when evaluating overall impairment preexisting problems must be considered. He asserted that Dr. Diamond accurately applied the A.M.A., *Guides* when he considered both appellant's preexisting conditions and the December 20, 2013 employment injury. Counsel further alleged that because the DMA disagreed with Dr. Diamond's November 11, 2015 impairment rating, OWCP should have declared a conflict in medical opinion, and accordingly, referred her to an impartial medical examiner to resolve the conflict.

[9] *Id.* at 395, Table 15-3.

[10] *Id.* at 406, Table 15-7.

[11] *Id.* at 410, Table 15-9.

[12] *Id.* at 408, Table 15-8.

By decision dated September 16, 2016, OWCP's hearing representative affirmed the March 7, 2016 schedule award decision. He found that appellant failed to establish that she had more than 12 percent permanent impairment of her left upper extremity. The hearing representative noted that the weight of the medical evidence still rested with Dr. Slutsky, serving as OWCP's DMA, who correctly applied the A.M.A., *Guides* to the examination findings.

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.[13] 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.[14] 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.[15]

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, *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).[16] 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.[17]

When determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.[18] Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the

[13] *See* 20 C.F.R. §§ 1.1-1.4.

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

[15] 20 C.F.R. § 10.404; *see also Ronald R. Kraynak,* 53 ECAB 130 (2001).

[16] *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).

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

[18] *Carol A. Smart,* 57 ECAB 340, 343 (2006); *Michael C. Milner,* 53 ECAB 446, 450 (2002).

same member or function.[19] If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.[20] There are no provisions for apportionment under FECA,[21] but when the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.[22]

ANALYSIS

The issue on appeal is whether appellant has met her burden of proof to establish more than 12 percent permanent impairment of her left 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 ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[23] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[24] 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 are 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.[25]

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 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied

[19] *Supra* note 16 at Chapter 2.808.5d.

[20] *Id.*

[21] *Id.*

[22] *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

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

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

[25] *Supra* note 23.

uniformly[26] 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.[27]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 16, 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 2, 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

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

[27] Dr. Slutsky did not address whether the noted digit ROM limitations represented a preexisting impairment. *See supra* notes 18 and 19.