United States Department of Labor
Employees' Compensation Appeals Board

K.B., Appellant	)	
and	)	**Docket No. 17-1049**
	)	**Issued: May 23, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

Appearances:
Appellant, pro se
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 April 12, 2017[1] appellant 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 the claim.[3]

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from October 14, 2016, the date of OWCP's last decision, was April 12, 2017. Since using April 13, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 12, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The record provided the Board includes evidence received after OWCP issued its October 14, 2016 decision. The Board's review is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met her burden of proof to establish greater than eight percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On February 27, 2012 appellant, then a 37-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury to her right side when she fell over a flower pot after being charged by a customer's dog while trying to deliver a certified letter.[4] She stopped work the same day. OWCP accepted the claim for contusion of the right shoulder and upper arm, closed right acromioclavicular dislocation, and brachial plexus lesions. Appellant received continuation of pay and OWCP then paid wage-loss compensation benefits on the supplemental rolls commencing April 13, 2012.

Appellant was initially treated conservatively and subsequently underwent OWCP approved surgery on February 12, 2014 for right-sided thoracic outlet syndrome.[5] She remained off work until May 4, 2015.[6] Appellant retired on disability from the employing establishment on October 13, 2015. She remained under the care of Dr. Michael S. Kendrick, an interventional pain management specialist and Board-certified anesthesiologist, for thoracic outlet syndrome and pain management.

On March 16, 2016 OWCP requested that Dr. Richard Rex Harris,[7] a Board-certified orthopedic surgeon and OWCP referral physician, determine whether appellant sustained a permanent impairment due to the February 27, 2012 employment injury and subsequent surgery of February 12, 2014.

In a March 22, 2016 report, Dr. Kendrick noted appellant's thoracic outlet syndrome. He indicated that she reached MMI on January 18, 2015. Dr. Kendrick advised that appellant would be sent for a functional capacity evaluation (FCE) and permanent impairment rating.

[4] The customer's dog ran out the front door and charged appellant. While appellant backed up and sprayed the dog with dog spray, she fell backwards over a flower pot and injured her right side. She claimed injury to her right ankle, right hip, right hand, right wrist, right elbow, right shoulder, right side of neck, back, and back side of left shoulder.

[5] Dr. William D. Whitley, a vascular surgeon specialist, performed a right-sided thoracic outlet decompression and right first rib resection.

[6] In a December 9, 2015 decision, OWCP reversed a May 7, 2015 termination of appellant's wage-loss compensation due to refusal of suitable work. It found that she was entitled to wage-loss compensation from May 2 to 15, 2015.

[7] OWCP originally referred appellant to Dr. Harris in December 2014 for a determination of her work-related conditions and her capacity to work. In a January 8, 2015 report, Dr. Harris opined that appellant was not able to perform her usual job, but could perform a sedentary or light-duty job for eight hours a day with permanent restrictions. He opined that she reached maximum medical improvement (MMI) and that she should start a sedentary or light-duty position four hours a day and progress to eight hours a day.

In an April 17, 2016 report, Dr. Harris reviewed the statement of accepted facts and noted that appellant stated that she had continued pain in her right shoulder with swelling. He reported full range of motion of the neck. Tenderness was noted to palpation over the right shoulder with a well-healed scar on the medial aspect of the right shoulder. Abduction of the right shoulder was 90 degrees, flexion was 90 degrees, and extension was 20 degrees. Full range of motion of the right elbow and right wrist was exhibited. Grip strength was 5/5 on the right. No evidence of atrophy of the right upper extremities was seen and reflexes were 1+ and equal in the upper extremities. Appellant was able to open and close doors, button and unbutton, and pick up small objects on a table. Dr. Harris indicated that appellant reached MMI on February 14, 2015. This was the 12-month postsurgical intervention mark and appellant had continued with chronic pain with evidence of a scar and decreased range of motion of the right shoulder with decreased functional ability of the right shoulder. Dr. Harris noted that her subjective complaints required the use of medication. He indicated that the right shoulder had decreased range of motion and the right upper extremity had decreased strength and pinch as related to the left.

In a May 10, 2016 report, Dr. Harris found appellant had eight percent permanent impairment of her right upper extremity impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[8] based on range of motion (ROM) findings. He found that 90 degrees abduction of the right shoulder accounted for three percent impairment; 90 degrees flexion accounted for three percent impairment; and 20 degrees extension accounted for two percent impairment, for a total of eight percent permanent impairment.

Appellant sought emergency room treatment on July 7, 2016 and indicated that she had shoulder pain ever since her FCE a few weeks ago. Dr. Brian J. Tierney, an emergency medicine specialist, diagnosed acute right shoulder pain and discharged appellant. In an addendum to the July 7, 2016 hospital report, Dr. Joseph A. Hudson, an emergency medicine specialist, indicated that the radiologist's report showed possible incomplete fracture of the acromion.

A July 26, 2016 right shoulder magnetic resonance imaging (MRI) scan revealed mild, diffuse right supraspinatus and infraspinatus tendinosis with trace fluid in the subacromial/ subdeltoid bursa; diminutive/small bicipital tendon long head, suggestive of mild tendinopathy; and subtle right anterior labral degenerative fraying.

In an August 23, 2016 report, Dr. Kendrick reported no acute examination changes. He indicated that appellant was self-limiting her assessment significantly. Dr. Kendrick referred her to psychiatry for depression.

On October 6, 2016 appellant filed a claim for a schedule award (Form CA-7).

OWCP's district medical adviser (DMA), Dr. Michael M. Katz, a Board-certified orthopedic surgeon, reviewed the claim on October 6, 2016, and agreed with Dr. Harris' eight percent ROM impairment rating. He noted that Dr. Harris determined no additional permanent

[8] A.M.A., *Guides* 475, Table 15-34 (2009).

impairment of the right brachial plexus lesion. The DMA indicated that the date of MMI was April 17, 2016, the date of Dr. Harris' examination upon which he based his impairment opinion.

By decision dated October 14, 2016, OWCP granted appellant a schedule award for eight percent permanent impairment of her right upper extremity. The award covered a period of 24.96 weeks, from April 17 to October 8, 2016.

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.[9] 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.[10] 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.[11]

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).[12] 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.[13]

ANALYSIS

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

The issue is whether appellant has more than eight percent permanent impairment of the right upper extremity, for which she previously received a schedule award. OWCP has accepted

[9] *See* 20 C.F.R. §§ 1.1-1.4.

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

[11] 20 C.F.R. § 10.404; *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[12] 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).

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

the claim for contusion of the right shoulder and arm, closed right acromioclavicular dislocation, and brachial plexus lesions. It also authorized surgical correction of right thoracic outlet syndrome. Appellant's schedule award was paid based upon a ROM permanent impairment rating provided by Dr. Harris. However, neither Dr. Harris nor OWCP's DMA, Dr. Katz, attempted to rate appellant's accepted conditions using a diagnosis-based impairment (DBI) methodology.

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 methodologies when assessing the extent of permanent impairment for schedule award purposes.[14] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[15] 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 A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[16] 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 applied uniformly,[17] 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.

CONCLUSION

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

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

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

[16] *Supra* note 14.

[17] *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 23, 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