# United States Department of Labor
# Employees' Compensation Appeals Board

| | | |
|---|---|---|
| **G.B., Appellant** | ) | |
| **and** | ) | **Docket No. 18-0545** |
| | ) | **Issued: November 19, 2018** |
| **DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINEERING CMD-CENTERS, San Diego, CA, 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 January 22, 2018 appellant, through counsel, filed a timely appeal from a November 13, 2017 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 his burden of proof to establish more than 19 percent permanent impairment of his right upper extremity, for which he previously received schedule award compensation.

## ***FACTUAL HISTORY***

On April 22, 2003 appellant, then a 61-year-old engineering equipment operator, filed an occupational disease claim (Form CA-2) alleging that he developed right elbow bursitis causally related to factors of his federal employment. He stopped work on April 11, 2003. OWCP accepted appellant's claim on August 27, 2003 for right elbow strain and right elbow bursitis.

In an April 23, 2015 letter, Dr. Arnold Markman, a Board-certified occupational medicine physician, indicated that appellant had reached maximum medical improvement (MMI).

Appellant filed a claim for a schedule award (Form CA-7) on June 3, 2015.

By development letter dated June 26, 2015, OWCP advised appellant of the deficiencies in his schedule award claim and afforded him 30 days to submit additional medical evidence, including an impairment rating, which applied the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In a September 30, 2015 medical report, Dr. Michael E. Hebrard, a Board-certified physiatrist, discussed appellant's factual and medical history regarding his accepted employment injuries and reported the findings of the examination he conducted on September 30, 2015. He diagnosed sprain of the elbow and forearm and other nonspecified sites on the right. Dr. Hebrard determined that appellant had reached MMI regarding his accepted April 10, 2003 employment injuries. He noted that he had continuing residual functional issues with intermittent pain and weakness upon grasping and pinching. Appellant found ways to modify his activities to stay functionally independent while performing his daily activities. Dr. Hebrard opined that, based on his review of the medical records, appellant's current condition not only had reached MMI status, but he was also not a surgical candidate.

Utilizing Table 15-4, (Elbow Regional Grid for the Upper Extremity) of the sixth edition of the A.M.A., *Guides*, Dr. Hebrard found that appellant's right elbow sprain and strain was a class 1 impairment. He assigned a grade modifier 2 for functional history and clinical examination. Dr. Hebrard used the net adjustment formula and calculated a net adjustment of 2, which equated to a class 1, grade E, two percent permanent impairment of the right upper extremity. He addressed appellant's treatment plan and noted that appellant had retired.

By letter dated September 30, 2016, OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether

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

appellant had a ratable permanent impairment pursuant to the sixth edition of the A.M.A., *Guides* due to his accepted right elbow conditions.

In a November 1, 2016 report, Dr. Hanley discussed appellant's factual and medical history regarding his accepted employment injuries and reported the findings of the examination he conducted on November 1, 2016. He reported that appellant was in no acute distress. Dr. Hanley was able to sit comfortably and remove his jacket without any trouble. Range of motion (ROM) testing of the shoulders revealed 175 degrees of abduction. ROM testing of the elbow revealed full extension to 0 and flexion to 135 degrees. The tissues over the olecranon on both sides was loose and not swollen. There was no evidence of any spurring off the olecranon itself. There was also no evidence of any fluid within or around the joint, pronation/supination was full, grip strengths were adequate, and there were no objective signs of residuals at that time. Dr. Hanley diagnosed a history of sprain/strain of the right elbow with development of olecranon bursitis, resolved. He advised that there were no objective findings or subjective complaints related to the right elbow at that time. Dr. Hanley noted that appellant had reached MMI on August 22, 2003. He maintained that appellant had no preexisting permanent impairment of the same member or function.

Dr. Hanley related that he provided an impairment rating in accordance with the sixth edition of the A.M.A, *Guides* based, not only on appellant's diagnosis of right elbow sprain, but also on his diagnosis of olecranon bursitis as the record contained clear evidence of this condition. He applied the diagnosis-based impairment (DBI) method of rating permanent impairment and noted that, under Table 15-4 on page 398 of the sixth edition of the A.M.A., *Guides*,[4] appellant had a class 0 impairment rather than a class 1 impairment for his right elbow sprain and bursitis as appellant had no significant subjective abnormal findings of muscle or tendon injury at MMI. Dr. Hanley concluded that he had zero percent impairment of the right upper extremity.

On April 25, 2017 Dr. Herbert White, Jr., an occupational medicine specialist serving as an OWCP district medical adviser (DMA), reviewed a SOAF and the medical record, including Dr. Hebrard's September 30, 2015 findings and Dr. Hanley's November 1, 2016 findings. He agreed with Dr. Hanley's impairment rating finding zero percent impairment of the right upper extremity. Dr. White applied the DBI rating method under Table 15-4 beginning on page 398 of the sixth edition of the A.M.A., *Guides* and found that appellant had a class 0 impairment for his elbow sprain because he had no significant subjective abnormal findings of muscle or tendon injury at MMI. He concluded that appellant had zero percent permanent impairment of the right upper extremity. Dr. White explained that he used the DBI rating method because the A.M.A., *Guides* indicated that this method should be used for calculating spine impairment, as well as, lower extremity impairment. He determined that appellant had reached MMI on September 30, 2015, the date of Dr. Hebrard's impairment evaluation.

By decision dated April 25, 2017, OWCP found appellant was not entitled to an additional schedule award for his right upper extremity based on the medical opinions of Dr. Hanley and Dr. White. It noted that he had previously received schedule awards for 19 percent permanent

[4] The Board notes that Dr. Hanley inadvertently stated that Table 15-4 was located on page 298 rather than page 398 of the sixth edition of the A.M.A., *Guides* as his findings correspond to the values listed in Table 15-4 on page 398 for elbow impairment.

impairment of the right upper extremity and 7 percent permanent impairment of the left upper extremity which were granted in a claim under OWCP File No. xxxxxx643. The previous schedule award for permanent impairment of appellant's right upper extremity was based upon permanent impairment of appellant's right wrist and right shoulder. Because the new rating did not exceed the percentage already paid, OWCP concluded that appellant was not entitled to an additional schedule award for the right upper extremity.

In a letter received on May 5, 2017, appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. At the hearing, which was held on October 3, 2017, counsel contended that Dr. White failed to compare the DBI and the ROM impairment methodologies to determine which resulted in a higher impairment rating and, thus, requested, pursuant to the Board's decision in *T.H.*,[5] and FECA Bulletin No. 17-06, that the case be remanded to OWCP for recalculation of appellant's impairment rating by Dr. White. Appellant testified that, although he had not sought medical treatment for his work-related conditions since 2003, he experienced intermittent pain in his right shoulder and right elbow for which he treated with medication provided by a family physician. He also testified that he had retired from civil service.

By decision dated November 13, 2017, an OWCP hearing representative affirmed the April 25, 2017 decision, finding that the medical evidence of record did not support that appellant was entitled to an additional schedule award. She noted that the medical evidence was insufficient to establish that he had any impairment or residuals causally related to his accepted employment-related right elbow conditions. The hearing representative further noted that Dr. White's report failed to conform to the requirements of FECA Bulletin No. 17-06 because he did not compare the DBI and ROM methodologies to determine which method provided the higher impairment rating, but related that this defect did not warrant remand of the case to OWCP for further proceedings as appellant had not established causal relationship between his residuals and accepted work injuries. She also indicated that even if Dr. White had agreed with Dr. Hebrard's two percent right upper extremity permanent impairment rating, appellant would not be entitled to an additional schedule award as the percentage of permanent impairment was not greater than the 19 percent permanent impairment previously awarded.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA,[6] and its implementing federal regulations,[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted

[5] Docket No. 14-0943 (issued November 25, 2016).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

The sixth edition requires identifying the impairment class for the class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11]

The A.M.A., *Guides* also provide that the ROM impairment method is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other diagnosis-based sections are applicable.[12] If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.[13] Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.[14]

OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology versus the ROM methodology basis for rating of upper extremity impairments.[15]

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

> "As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).
>
> "Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM), and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the* [*A.M.A.*,]

[8] *Id.* at § 10.404(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims , *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* 479.

[11] *Id.* at 401-19.

[12] *Id.* at 461.

[13] *Id.* at 473.

[14] *Id.* at 474.

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

*Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.*" (Emphasis in the original.)[16]

The Bulletin further advises:

"If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE.

"If the medical evidence of record is not sufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical evidence necessary to complete the rating. However, the DMA should still render an impairment rating using the DBI method, if possible, given the available evidence."[17]

"Upon receipt of such a report, and if the impairment evaluation was provided from the claimant's physician, the CE should write to the claimant advising of the medical evidence necessary to complete the impairment assessment and provide 30 days for submission. Any evidence received in response should then be routed back to the DMA for a final determination. Should no evidence be received within 30 days of the date of the CE's letter, the CE should proceed with a referral for a second opinion medical evaluation to obtain the medical evidence necessary to complete the rating. After receipt of the second opinion physician's evaluation, the CE should route that report to the DMA for a final determination."[18]

## ***ANALYSIS***

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

As noted above, FECA Bulletin No. 17-06 provides that, if the rating physician provided an assessment using the ROM method, and the A.M.A., *Guides* allows for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE.[19]

The Board therefore finds that this case requires further development of the medical evidence. Since Dr. Hanley found that appellant had less than normal elbow flexion of 135 degrees which could be rated under Table 15-33 on page 474 of the A.M.A., *Guides* and provided a rating

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See supra* note 16.

under the DBI method and Table 15-4 also allows (by asterisk) application of the ROM rating method, Dr. White should have independently calculated appellant's impairment using both the ROM and DBI methods under the relevant standards of the sixth edition of the A.M.A., *Guides,* and identified the higher rating for the claims examiner.[20] If the medical evidence of record is not sufficient for Dr. White to render a rating using the ROM or DBI method, he should advise as to the medical evidence necessary to complete the rating.[21]

The Board also notes that appellant was granted a prior schedule award for permanent impairment of the right wrist and shoulder. The current schedule award claim is for permanent impairment of his right elbow. OWCP regulations provide that benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) OWCP finds that the later impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[22] As OWCP did not adequately explain why appellant's current claim would duplicate his previous compensation, upon remand if OWCP determines that appellant has a permanent impairment of his right elbow, it shall obtain clarification from an OWCP medical adviser regarding whether the latest rating would in whole or in part duplicate of the prior schedule award.[23]

## ***CONCLUSION***

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

[20] *Id.*

[21] *Id.*

[22] 20 C.F.R. § 10.404(d).

[23] *See A.T.*, Docket No. 17-1806 (issued January 12, 2018).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 13, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: November 19, 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