

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

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R.T., Appellant)	
)	
and)	Docket No. 18-1581
)	Issued: April 19, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
White Plains, NY, Employer)	
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Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 August 13, 2018 appellant, through counsel, filed a timely appeal from a June 4, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 three percent permanent impairment of her left upper extremity, for which she has previously received a schedule award.

FACTUAL HISTORY

On March 15, 2008 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she was talking to her supervisor when flat tubs fell, hitting her in the head, neck, and shoulder. By decision dated June 11, 2008, OWCP accepted the claim for sprain of lumbar back, sprain of neck, and sprain of left shoulder and upper arm. Appellant received intermittent wage-loss compensation and medical benefits on the supplemental rolls as of April 30, 2008. She stopped work on June 3, 2010 and did not return. In 2011, appellant advised OWCP that she had retired.

On September 26, 2016 appellant filed a claim for a schedule award (Form CA-7). In support of her claim she submitted a May 12, 2015 note from Dr. Sathish R. Modugu, Board-certified in pain medicine, who opined that appellant had reached maximum medical improvement (MMI).

In an October 18, 2016 medical report, Dr. Stewart A. Kaufman, a Board-certified orthopedic surgeon, noted appellant's history of injury, reviewed the medical evidence, discussed her medical history, and provided examination findings. He performed range of motion (ROM) testing of appellant's shoulders, elbows, wrists, cervical spine, and lumbar spine. Dr. Kaufman diagnosed sprain of the cervical spine with C4-5, C5-6 right-sided herniated nucleus pulposus (HNP), and right C7 radiculopathy; lumbosacral sprain with degenerative disc disease; and right shoulder sprain. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ he provided ratings for his diagnosed conditions. Under the diagnosis-based impairment (DBI) for the lumbar spine, Dr. Kaufman utilized Table 17-6,⁴ the lumbar spine regional grid, to assign 8 percent whole person impairment, which corresponds to 20 percent of the left lower extremity pursuant to Table 16-10.⁵ For the cervical spine, he again utilized the DBI method and Table 17-6 to assign 15 percent whole person impairment, which corresponds to 25 percent right upper extremity impairment pursuant to Table 15-11.⁶ For the left shoulder, Dr. Kaufman utilized the ROM method in Table 15-34⁷ noting 3 percent for 95 degrees of flexion, 2 percent for 15 degrees of extension, 3 percent for 90 degrees of abduction, 1 percent for 20 degrees of [adduction], 2 percent for 45 degrees internal rotation, and 2 percent for 40 degrees external rotation, for a combined 13 percent left upper extremity

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.* at 575.

⁵ *Id.* at 530.

⁶ *Id.* at 420.

⁷ *Id.* at 475.

permanent impairment. He noted that appellant reached MMI on the date of his examination, October 18, 2016.

On December 13, 2016 OWCP routed Dr. Kaufman's report, a statement of accepted facts (SOAF), and the case file to Dr. Todd Fellars, a Board-certified orthopedic surgeon, serving as an OWCP district medical adviser (DMA), for review and determination of the date of MMI and regarding whether appellant sustained a permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

In a December 19, 2016 report, Dr. Fellars reviewed the case file and Dr. Kaufman's report, finding that appellant had reached MMI on May 12, 2015. He reported that he disagreed with Dr. Kaufman's impairment rating because he used diagnoses which were not accepted as work-related and grossly inflated. Dr. Fellars noted that the claim was accepted for a neck sprain, a condition which does not cause radiculopathy. Moreover, while appellant had spondylosis, the condition had not been accepted as work related. Dr. Fellars reported that appellant had no ratable impairment to the cervical or lumbar spine based on *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).⁸ For the left shoulder, he opined that the DBI method should be used, as the range of motion loss measured by Dr. Kaufman could not be clinically due to her mechanism of injury. Utilizing Table 15-5 of the A.M.A., *Guides*, Dr. Fellars diagnosed a contusion/crush injury with consistent complaints at a default two percent impairment value.⁹ He assigned a grade modifier of 1 for functional history (GMFH) and no grade modifiers were assigned for physical examination (GMPE) or clinical studies (GMCS). This warranted movement one place to the right of the default C value resulting in three percent permanent impairment of the left upper extremity.

In a development letter dated April 13, 2017, OWCP requested that appellant provide an addendum report from her physician pertaining to her impairment rating as the DMA noted that he had not applied the A.M.A., *Guides* correctly within the parameters set forth under FECA. It provided her with a copy of the DMA's report and *The Guides Newsletter* for rating impairments pertaining to the spinal nerve.

In a letter dated June 22, 2017, OWCP informed Dr. Kaufman that the DMA found that he failed to properly apply the A.M.A., *Guides* and requested that he comment on the findings of the DMA. It provided a copy of Dr. Fellar's December 19, 2016 report, a copy of the SOAF, the case record, and *The Guides Newsletter*.

In a June 27, 2017 addendum report, Dr. Kaufman responded to OWCP's letter, noting that he performed an examination on October 18, 2016. He concluded that appellant was incorrectly found to have sustained a contusion as the claim was only accepted for sprains to the neck, back, left shoulder, and upper arm. Dr. Kaufman reported that a sprain was defined as stretching or tearing of ligaments, which weakens the bonds between the bones such as the annulus which is between the vertebra, and also stabilized the disc between the vertebrae and keeps everything in place. He reported that a sprain can be the straw that breaks the camel's back, weakening the torn structures with progressive deterioration and weak scar. Dr. Kaufman referred to the differences

⁸ *The Guides Newsletter* (6th ed. July/August 2009).

⁹ *Supra* note 3 at 401.

seen over one year between a July 30, 2008 and October 22, 2009 MRI scan of the cervical spine. He indicated that how the condition would look in 2017, eight to nine years after the injury, was not known but might be extrapolated. He diagnosed cervical sprain with C4-5, C5-6 right sided HNP and right C6-7 radiculopathy, lumbosacral sprain with degenerative disc disease, and right shoulder sprain.

Dr. Kaufman recalculated his impairment rating based on *The Guides Newsletter*. He assigned the left shoulder disability to radiculopathy because of findings and the EMG study which revealed C6 or C7 left hand, C7 left radiculopathy. Using Table 1 of *The Guides Newsletter* for C6, he noted moderate decrease sensory for three points on the left and marked weakness on C6 left dermatome at nine points amounting to 12 percent permanent impairment. Dr. Kaufman further reported an added radiculopathy at C7 due to a moderate decrease in sensation for two points and a moderate weakness for nine points, amounting to an additional 11 percent permanent impairment. Thus, he opined that appellant sustained a total of 23 percent permanent impairment of the left upper extremity. Utilizing Table 2 for lumbosacral spine L5 left radiculopathy, Dr. Kaufman reported positive straight leg raising and weak heel walking at five points, mild sensory changes at one point, and mild motor loss at five points for a total six percent permanent impairment of the left lower extremity.¹⁰

OWCP routed Dr. Kaufman's addendum report to Dr. Fellars for review and comment pertaining to any permanent partial impairment and date of MMI in accordance with the sixth edition of the A.M.A., *Guides*.

In a September 20, 2017 addendum report, Dr. Fellars reported that he was not in dispute with Dr. Kaufman regarding the total impairment percentage. Rather, he disagreed with Dr. Kaufman because he failed to provide an impairment rating based on the accepted work-related conditions. Dr. Fellars explained that Dr. Kaufman opined that the sprain was the cause of appellant's radiculopathy because of weakening ligaments, which would result in spinal degeneration as a consequential condition. He noted that this was not supported by the current medical evidence. Dr. Fellars cited the A.M.A., *Guides* which now considered disc degeneration a condition that is determined largely by genetics as current research suggests that physical loading specific to occupation and sport play a relatively minor role in the disc degeneration. He reiterated that appellant had no impairment which related to the cervical and lumbar spine, finding that she sustained three percent permanent impairment of the left upper extremity for her left shoulder injury. Dr. Fellars further reported that the date of MMI was May 12, 2015, the date provided by appellant's treating physician, Dr. Mogudu.

By decision dated September 29, 2017, OWCP granted appellant a schedule award for three percent permanent impairment of the left upper extremity. The date of MMI was reported as May 12, 2015 and the award covered a period of 9.36 weeks from May 12 to July 16, 2015. OWCP found that the weight of the medical evidence rested with Dr. Fellars, serving as the DMA, because he correctly applied the A.M.A., *Guides* to the examination findings.

¹⁰ The Board notes that treating physician Dr. Kaufman inaccurately referred to himself as an "independent medical examiner."

On October 26, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

A hearing was held on March 20, 2018. Counsel argued that there was a conflict in medical evidence which warranted further development of the claim. Appellant was advised of the evidence needed in support of her claim and the record was held open for 30 days.

By decision dated June 4, 2018, OWCP's hearing representative affirmed the September 29, 2017 decision, finding that appellant was entitled to no more than three percent permanent impairment of the left upper extremity previously awarded. He found that the weight of the medical evidence rested with Dr. Fellars serving as OWCP's DMA.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.¹¹ 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be 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

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.¹³ A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under FECA.¹⁴ Moreover, neither FECA, nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.¹⁵ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹⁶

In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be

¹¹ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

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

¹³ *T.S.*, Docket No. 17-1149 (issued February 7, 2018); *James E. Mills*, 43 ECAB 215 (1991).

¹⁴ *T.S., id.*; *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁵ *See D.A.*, Docket No. 18-0779 (issued December 12, 2018); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁶ *See 5 U.S.C. § 8101(19)*; *Francesco C. Veneziani*, 48 ECAB 572 (1997).

entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹⁷

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.¹⁸ The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹⁹ In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.²⁰

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).²¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).²²

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. 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 combined.²³ 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.²⁴

Regarding the application of the ROM or DBI 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

¹⁷ See *G.S.*, Docket No. 17-0855 (issued December 11, 2018).

¹⁸ See *G.N.*, Docket No. 10-0850 (issued November 12, 2010); see also *supra* note 5 at Chapter 3.700, Exhibit 1, n.5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁹ *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

²⁰ See *E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

²¹ A.M.A., *Guides* 383-492.

²² *Id.* at 411.

²³ *Id.* at 473.

²⁴ *Id.* at 473-74.

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.,] *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.”²⁵ (Emphasis in the original.)

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.”²⁶

ANALYSIS

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

While Dr. Kaufman rated appellant’s permanent impairment due to his diagnoses of her cervical and lumbar spine conditions, Dr. Fellars properly explained that the accepted conditions of cervical and lumbar sprain had not caused permanent impairment due to peripheral nerve impairment, which would be ratable under the provisions of *The Guides Newsletter*.²⁷ Schedule awards are granted for permanent impairment of a scheduled member or function of the body causally related to the accepted employment related conditions.²⁸ Therefore, the Board finds that Dr. Fellars properly concluded that appellant was only entitled to a schedule award for permanent impairment of her left shoulder.

Because Dr. Kaufman provided a rating based upon appellant’s loss of ROM to the left shoulder, which was allowed under Table 15-5 of the A.M.A., *Guides*, Dr. Fellars, serving as the DMA, should have independently calculated appellant’s permanent impairment using both the ROM and DBI method and identified the higher rating for the claims examiner.²⁹ However, the DMA failed to utilize the ROM method when calculating appellant’s left shoulder impairment

²⁵ FECA Bulletin No. 17-06 (May 8, 2017); *V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

²⁶ *Id.*

²⁷ *See supra* note 15.

²⁸ *See J.H.*, Docket No. 17-1916 (issued January 9, 2019).

²⁹ If the medical evidence of record is insufficient for the DMA to render a rating using the ROM methodology, the DMA should have advised as to the medical evidence necessary to complete the rating. *See* A.M.A., *Guides* 401, Table 15-5.

despite Dr. Kaufman having provided three independent measurements for left shoulder ROM findings. While the DMA opined that appellant's mechanism of injury would not cause the lack of motion documented, he failed to provide support or explanation for such an assertion. Dr. Fellars' report was therefore insufficient to form the basis of appellant's schedule award claim as he did not appropriately evaluate impairment based on both the ROM and DBI method in order to determine the method which produced the higher rating.³⁰ As such, OWCP failed to properly develop the medical evidence by requesting that the DMA provide an impairment rating in accordance with the guidance in FECA Bulletin No. 17-06 for consistently rating upper extremity impairments.³¹

This case will therefore be remanded for further development consistent with OWCP's procedures found in FECA Bulletin No. 17-06. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2018 Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 19, 2019
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

³⁰ *V.H.*, Docket No. 18-0848 (issued February 25, 2019).

³¹ *C.J.*, Docket No. 17-1570 (issued February 9, 2018).