United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
and	)	**Docket No. 19-0510**
	)	**Issued: August 6, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 8, 2019 appellant, through counsel, filed a timely appeal from an August 9, 2018 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.

ISSUE

The issue is whether appellant has established more than five percent permanent impairment of the left upper extremity, for which she previously received a schedule award.

[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.*

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On June 7, 2008 appellant, then a 58-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her left leg and wrist when she fell on cracked pavement while in the performance of duty. OWCP accepted the claim for left closed distal radius fracture, abrasion of trunk without infection, abrasion of right elbow without infection, and left knee contusion. Acceptance of the claim was subsequently expanded to include left upper limb reflex sympathetic dystrophy.

On June 5, 2014 appellant filed a claim for a schedule award (Form CA-7). By decision dated April 29, 2015, OWCP granted her a schedule award for five percent permanent impairment of the left upper extremity.

In a letter dated May 5, 2015, appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on September 24, 2015.

By decision dated December 9, 2015, an OWCP hearing representative set aside the April 29, 2015 decision and remanded the case for review of the medical evidence by an OWCP medical adviser.

Following remand, by decision dated February 17, 2016, OWCP denied appellant's claim for an additional schedule award.

On May 24, 2016 appellant, through counsel, appealed to the Board. By decision dated July 7, 2017, the Board set aside OWCP's February 17, 2016 decision.[4] The Board found there was an unresolved conflict in the medical opinion evidence regarding the extent of permanent impairment arising from appellant's left wrist fracture complex regional pain syndrome (CRPS) between Dr. David Weiss, appellant's treating osteopathic physician, and OWCP's medical adviser Dr. Taisha S. Williams, a specialist in physical medicine and rehabilitation. The Board instructed OWCP to refer appellant to an impartial medical examiner for a reasoned medical opinion with respect to appellant's employment-related permanent impairment of the left upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] The Board further instructed OWCP to issue a *de novo* decision after such further development of the evidence as necessary.

On November 6, 2017 OWCP referred appellant to Dr. Mohammed H. Zamani, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion.

In a November 28, 2017 report, Dr. Zamani reviewed the statement of accepted facts (SOAF), appellant's history of injury, and the medical evidence of record. Physical examination

[3] Docket No. 16-1230 (issued July 7, 2017).

[4] *Id.*

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

findings revealed full bilateral wrist range of motion (ROM), full bilateral radial and ulnar wrist deviation, no tenderness over the left distal ulnar radius, stiffness of the left hand, inability to make a full fist with the left hand, normal bilateral hand sensation, negative bilateral wrist or forearm Tinel's sign, and no sign of nerve entrapment. Dr. Zamani opined that appellant no longer had any regional pain and, thus, did not have a ratable impairment for this condition under the sixth edition of the A.M.A., *Guides*. He indicated that "according to the Sixth Edition of the *Guides* that she had five percent permanent impairment in the left upper extremity as a result of the accident and subsequent treatment."

In a letter dated April 12, 2018, OWCP requested that Dr. Zamani provide a supplemental opinion addressing the conflict in the medical opinion regarding the extent and degree of appellant's left upper extremity permanent impairment regarding her left wrist fracture.

In an April 27, 2018 addendum, Dr. Zamani concluded that appellant had five percent permanent impairment of the left upper extremity using the sixth edition of the A.M.A., *Guides*. He noted that she was not on pain medication and no longer complained about left upper extremity pain except for her fingers and hands. While nerve testing showed some neuropathy, Dr. Zamani found no muscle atrophy of the thenar area nor any signs of upper extremity nerve entrapment. He reported a healed left wrist fracture. Thus, Dr. Zamani concluded that appellant was not entitled to greater than five percent permanent impairment of the left upper extremity.

By decision dated August 9, 2018, OWCP found that appellant was not entitled to an additional schedule award. It found that the special weight of the medical opinion evidence was represented by Dr. Zamani, the impartial medical examiner.

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 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]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the wrist, reference is made to Table 15-3 (Wrist Regional Grid) beginning on page 395. After the class of diagnosis (CDX) is determined from the Wrist Regional

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[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); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

OWCP issued FECA Bulletin No. 17-06 to explain the use of the diagnosis-based impairment (DBI) methodology versus the ROM methodology for rating of upper extremity impairments.[11] Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

> "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.,] 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.*"[12] (Emphasis in the original).

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[13] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

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

[10] *See* A.M.A., *Guides* 411.

[11] 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).

[12] *Id*.

[13] 5 U.S.C. § 8123(a).

[14] *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0476 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002).

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's February 17, 2016 decision because the Board considered that evidence in its July 7, 2017 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[15]

In the prior appeal, the Board found a conflict in medical opinion between appellant's treating physician and OWCP's physicians regarding the extent and degree of appellant's permanent impairment of the upper extremities. On remand OWCP referred appellant to Dr. Zamani, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his November 28, 2017 report, Dr. Zamani found that appellant was not in any pain. He opined that her CRPS stemming from her June 7, 2008 employment injury had subsided and that as such she no ratable impairment. Dr. Zamani indicated that, "according to the Sixth Edition of the [A.M.A.], *Guides*, she had five percent permanent impairment in the left upper extremity as a result of the accident and subsequent treatment." In an April 27, 2018 addendum report, he opined that appellant did not have any permanent impairment due to the accepted CRPS as the condition had subsided and that she was not entitled to an additional permanent impairment for the accepted left radius distal fracture. However, the Board finds that Dr. Zamani did not adequately explain this opinion in accordance with the relevant standards. While he provided physical examination findings, Dr. Zamani failed to provide any discussion of the relevant portion of the sixth edition of the A.M.A., *Guides* he used in finding appellant had no more than five percent left upper extremity permanent impairment. The Board notes that a rating based upon appellant's loss of ROM of her upper extremity for a wrist fracture is allowed (by asterisk) pursuant to Table 15-3 of the A.M.A., *Guides*.[16] Dr. Zamani did not provide a rating consistent with the A.M.A., *Guides* based upon ROM or DBI methodology.[17]

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification and/or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[18]

For the above-described reasons, the opinion of Dr. Zamani requires clarification. Therefore, in order to resolve the continuing conflict in the medical opinion evidence, the case will be remanded to OWCP for referral to Dr. Zamani for a supplemental report regarding the degree and extent of appellant's left upper extremity permanent impairment utilizing both the ROM and DBI methodologies. If Dr. Zamani is unable to clarify his reports or if his second supplemental report is also vague, speculative, or lacking in rationale, OWCP should refer appellant to a new impartial medical examiner for the purpose of obtaining a rationalized medical opinion on the

[15] *J.T.*, Docket No. 18-1757 (issued April 19, 2019).

[16] A.M.A., *Guides* 395, Table 15-3.

[17] *Supra* notes 11 to 12.

[18] *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

issue.[19] After carrying out this and other such further development as 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 August 9, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 6, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[19] *L.L., supra* note 14; *Harold Travis*, 30 ECAB 1071 (1979).