United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 18-1140**
	)	**Issued: January 29, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION AUGUSTA VETERANS MEDICAL CENTER, Augusta, GA, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 15, 2018 appellant, through counsel, filed a timely appeal from a March 19, 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.

[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 upper extremity permanent impairment for schedule award purposes.

FACTUAL HISTORY

On June 17, 2003 appellant, then a 47-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on June 16, 2003 she sustained a neck and right shoulder injury in the performance of duty when she caught a patient who had collapsed. By decision dated August 5, 2003, OWCP accepted the claim for cervical and right shoulder strain under the current claim, OWCP File No. xxxxxx248. Appellant sought treatment for her conditions and was released to regular-duty work on June 24, 2003. The record reflects that she stopped treatment for her injury on November 14, 2003, the date of her last physical therapy progress note.[3]

On May 26, 2016 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated June 22, 2016, OWCP advised appellant that additional evidence was needed to establish her claim, including an opinion from her treating physician as to whether maximum medical improvement (MMI) had been reached and a permanent impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] No evidence was received.

By decision dated February 10, 2017, OWCP denied appellant's schedule award claim finding that she had not submitted medical evidence, as requested, providing a permanent impairment rating under the A.M.A., *Guides*.

On February 20, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In support of her claim, appellant submitted an August 17, 2017 medical report from Dr. Audrey M. Henderson, Board-certified in family medicine. Dr. Henderson reported that appellant injured her right shoulder, on June 16, 2003, and was diagnosed with cervical sprain and sprain of the right shoulder and upper arm. She noted that, since that time, appellant had ongoing pain in her right shoulder and also developed pain in her left shoulder due to overuse. Dr. Henderson noted that, in 2013, appellant was pushing a patient to the bus and felt pain in her

[3] The Board notes that on October 25, 2013 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of disability of September 27, 2014. By decision dated October 20, 2015, OWCP's hearing representative denied appellant's recurrence claim. Appellant had a claim for a new traumatic injury claim based on appellant's October 25, 2013 Form CA-2a. The case was assigned OWCP File No. xxxxxx595. By decision dated January 3, 2014, OWCP denied appellant's traumatic injury claim. On March 27, 2015 appellant also filed an occupational disease claim (Form CA-2) alleging a left shoulder injury which required surgery due to a patient falling on her in 2003, OWCP File No. xxxxxx551. By decision dated March 23, 2016, OWCP denied appellant's occupational disease claim. Appellant has not appealed from either decision. OWCP's hearing representative administratively combined OWCP File Nos. xxxxxx248, xxxxxx595, and xxxxxx551 with OWCP File No. xxxxxx248 identified as the master file.

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

right shoulder. Appellant was diagnosed with rotator cuff tear and underwent emergency surgery on October 25, 2013. She returned to work, but continued to experience pain, resulting in overuse of the left shoulder. The pain in the left shoulder progressed and appellant was diagnosed with left shoulder outlet impingement syndrome and left shoulder adhesive capsulitis in 2015. Dr. Henderson diagnosed chronic shoulder strain, chronic cervical strain, status post right subacromial decompression in 2013, and status post left rotator cuff repair in 2015.

By decision dated September 22, 2017, an OWCP hearing representative affirmed the February 10, 2017 decision, finding that the evidence submitted was insufficient to establish permanent impairment of a scheduled member or function of the body causally related to the accepted June 16, 2003 employment injury.

On December 22, 2017 appellant, through counsel, requested reconsideration of the September 22, 2017 decision. Counsel noted submission of a report from Dr. Neil Allen, Board-certified in internal medicine, in support of appellant's schedule award claim.

In an October 27, 2017 report, Dr. Allen discussed appellant's June 16, 2003 injury when she was on duty as a nurse's assistant and a patient fell on top of her, causing injury to her neck and right shoulder. He noted that she underwent left shoulder surgery on April 13, 2015 and received epidural injections and physical therapy for her cervical spine injury. Dr. Allen provided physical examination findings and a review of diagnostic testing pertaining to the cervical spine and right shoulder. He referred to proposed Table 1 of *The Guides Newsletter*, Spinal Nerve Impairment, Upper Extremity Impairment, to determine that appellant had no motor or sensory impairments pertaining to the cervical spine.[5] Dr. Allen determined that the diagnosis-based impairment (DBI) was a class zero impairment defined as no motor deficit with an assigned default value of zero percent upper extremity impairment at the bilateral C5 to C8 spinal levels.[6] He further determined that the DBI was a class zero impairment defined as no sensory deficit with an assigned default value of zero percent upper extremity impairment at the bilateral C5-T1 spinal levels. Assignment of grade modifiers and adjustment did not change the motor and sensory deficit values, resulting in zero percent permanent impairment of the right and left upper extremities.[7]

With respect to the right shoulder impairment, Dr. Allen reported that the range of motion (ROM) method for assessing permanent impairment was used as it provided greater upper extremity impairment than the DBI method for a rotator cuff injury, full thickness tear.[8] Utilizing Table 15-34 of the A.M.A., *Guides*, shoulder ROM, he determined that appellant sustained nine percent permanent impairment of the right upper extremity based on measurements revealing decreased ROM. Dr. Allen measured ROM and determined that, for the right shoulder, 130 degrees abduction yielded three percent impairment, 110 degrees forward flexion yielded three percent impairment, 40 degrees extension yielded one percent impairment, 80 degrees adduction yielded zero percent impairment, 50 degrees internal rotation yielded two percent impairment, and

[5] Table 1, *The Guides Newsletter*, (6th ed.) (July/August 2009).

[6] *Supra* note 6 at 425, Table 15-14.

[7] *Id.*

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

70 degrees external rotation yielded zero percent impairment. He assigned a ROM grade modifier of one[9] and a grade modifier of three for functional history due to appellant's *Quick*DASH score of 80.[10] Dr. Allen determined that, because the functional history grade modifier was two grades higher than the ROM grade modifier, the total ROM impairment should be multiplied by 10 percent.[11] This resulted in nine percent permanent impairment of the right upper extremity.[12]

On January 3, 2018 OWCP routed Dr. Neil's report and a series of questions to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained a permanent impairment and date of MMI. It noted the accepted conditions of cervical sprain and sprain of right acromioclavicular shoulder and upper arm.

In a January 5, 2018 report, Dr. Katz noted the accepted conditions of cervical and right shoulder sprain. He agreed with Dr. Allen's assessment that appellant sustained zero percent spinal nerve impairment of the left or right upper extremity based on calculations revealing no sensory or motor deficit. With respect to the right shoulder impairment, Dr. Katz identified a class one diagnosis for a rotator cuff injury, full thickness tear.[13] Utilizing the DBI method, he calculated seven percent permanent impairment of the right upper extremity. Dr. Katz also calculated impairment based on the ROM method finding 10 percent permanent impairment of the right upper extremity. He explained that he agreed with Dr. Allen's assessment using the ROM method as it yielded the higher impairment rating. However, Dr. Allen mistakenly added the total impairment for the affected arcs as eight percent, when the sum actually totaled nine percent (3+3+1+2). With the functional adjustment of 10 percent, Dr. Katz opined that appellant had sustained 10 percent permanent impairment of the right upper extremity. He concluded that MMI had been reached on October 27, 2017 the date of Dr. Allen's examination.

By decision dated March 19, 2018, OWCP affirmed the September 22, 2017 decision finding that the evidence was insufficient to establish permanent impairment to a member or function of the body. It found that the impairment ratings provided were based on a right rotator cuff tear, a condition not accepted as employment related. OWCP further found that the physicians had not explained how the right shoulder rotator cuff tear was related to the June 16, 2003 work injury. As the record did not contain an impairment rating based on the accepted conditions of cervical and right shoulder strain, OWCP determined that appellant had not met her burden of proof to establish entitlement to a schedule award.

[9] *Supra* note 6 at 477, Table 15-35.

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

[11] *Id.* at 477.

[12] *Id*. at 475, Table 15-34.

[13] *Id.* at 403, Table 15-5.

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.[14] 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.[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, 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).[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]

It is the claimant's burden of proof to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of an employment injury.[18] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment insufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[19]

[14] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[15] *Id.* at § 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 2.808.6a (March 2017).

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

[18] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[19] *Supra* note 16 at Chapter 2.808.5 (March 2017).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish upper extremity permanent impairment for schedule award purposes.

In support of her schedule award claim, appellant submitted an October 27, 2017 impairment evaluation from Dr. Allen. Utilizing the ROM method, Dr. Allen calculated nine percent permanent impairment of the right upper extremity due to a rotator cuff full thickness tear. On January 5, 2018 Dr. Katz serving as OWCP DMA, agreed with Dr. Allen's ROM rating for a rotator cuff tear, but found that calculations resulted in 10 percent permanent impairment of the right upper extremity.

The Board finds that the reports of Dr. Allen and Dr. Katz are insufficient to establish permanent impairment to appellant's right upper extremity.[20] The Board notes that the impairment should be based on the accepted conditions of cervical and right shoulder strain, but neither physician provided a rating for the conditions accepted for the June 16, 2003 injury.[21] Dr. Allen and Dr. Katz based their impairment rating on a full thickness rotator cuff tear, a condition which has not been accepted as employment related.[22] The physicians failed to provide an opinion causally relating the right rotator cuff tear to the June 16, 2003 injury.[23] It is appellant's burden of proof to establish that she suffers from additional injuries as a result of the accepted employment-related injury.[24]

Appellant also submitted an August 17, 2017 report from Dr. Henderson in which she noted appellant's history of injuries and diagnoses including chronic cervical and shoulder strain, status post right subacromial decompression, and status post rotator cuff repair, however, this report offered no permanent impairment rating of appellant's accepted conditions, as such it was of limited probative value.[25]

It is appellant's burden of proof to establish a permanent impairment of a scheduled member as a result of an employment injury.[26] She did not submit such evidence and thus, OWCP properly denied her schedule award claim.[27]

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[20] *K.S.*, Docket No. 15-1082 (issued April 18, 2017).

[21] *G.I.*, Docket No. 11-0030 (issued October 13, 2011).

[22] *R.W.*, Docket No. 15-1121 (issued August 12, 2015).

[23] OWCP's procedure manual provides that impairment ratings for schedule awards include those conditions accepted by OWCP as work related and any preexisting permanent impairment of the same member or function. *Supra* note 16 at Chapter 2.808.5(d) (March 2017). *See also Raymond E. Gwynn*, 35 ECAB 247, 253 (1983).

[24] *See Charlene R. Herrera*, 44 ECAB 361 (1993).

[25] *See supra* note 19.

[26] *Supra* note 18.

[27] *L.F.*, Docket No. 10-0343 (issued November 29, 2010); *V.W.*, Docket No. 09-2026 (issued February 16, 2010).

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish upper extremity permanent impairment for schedule award purposes.

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 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