United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 18-1314**
	)	**Issued: January 11, 2019**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Chula Vista, 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 June 20, 2018 appellant, through counsel, filed a timely appeal from a May 3, 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 his burden of proof to establish more than six percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On January 26, 2012 appellant, then a 50-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that, on January 18, 2012, he injured his left thumb while engaging in firearm qualification activities. OWCP assigned the claim File No. xxxxxx781. It accepted appellant's claim for left hand sprain/strain and open wound of left hand (except fingers) without complications. Appellant did not stop work for this injury.

The case record reveals that, under a separate claim, OWCP accepted that appellant sustained left shoulder impingement syndrome, left shoulder/upper arm contusion, and left shoulder tenosynovitis. OWCP assigned the claim File No. xxxxxx966. Under that claim, it granted appellant a schedule award on May 29, 2008 for six percent permanent impairment under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] The award ran for 18.72 weeks from March 13 to July 22, 2008 and was based on a May 15, 2008 assessment of Dr. Arthur S. Harris, a Board-certified orthopedic surgeon who served as a district medical adviser (DMA) for OWCP.[4] OWCP administratively combined File Nos. xxxxxx781 and File No. xxxxxx966, with case File No. xxxxxx966 designated as the master file.

On March 23, 2012 Dr. Lindy O'Leary, an attending occupational medicine physician, indicated that appellant's left thumb condition was permanent and stationary and she advised that appellant could perform his regular work.

On December 10, 2012 appellant filed a claim for compensation (Form CA-7) seeking an increased schedule award due to his accepted employment injuries.

In January 2013 OWCP referred appellant for a second opinion examination to Dr. William P. Curran, a Board-certified orthopedic surgeon. It requested that Dr. Curran evaluate the nature and extent of the permanent impairment of appellant's left upper extremity under the standards of the sixth edition of the A.M.A., *Guides*.[5]

In a January 23, 2013 report, Dr. Curran determined that appellant had zero percent permanent impairment of his left upper extremity under the sixth edition of the A.M.A., *Guides* due to residuals of his left thumb injury. He applied the diagnosis-based impairment (DBI) method

[3] A.M.A., *Guides* (5th ed. 2001).

[4] Dr. Harris evaluated the permanent impairment of appellant's left upper extremity that was related to his accepted left shoulder conditions.

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

of rating appellant's permanent impairment. On August 1, 2013 Dr. Ellen Pichey, a Board-certified occupational medicine physician serving as a DMA, agreed with Dr. Curran's assessment.

By decision dated August 8, 2013, OWCP denied appellant's claim for an increased schedule award, finding that appellant had not established more than six percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

On September 26, 2016 appellant filed a claim for compensation (Form CA-7) seeking an increased schedule award due to his accepted employment injuries.

Appellant submitted a January 6, 2017 report from Dr. Julie Ohayon, a Board-certified orthopedic surgeon, who found that appellant had one percent permanent impairment of his left upper extremity under the standards of the sixth edition of the A.M.A., *Guides.* Dr. Ohayon used the DBI method of rating permanent impairment.

By decision dated March 27, 2017, OWCP denied appellant's claim for an increased schedule award, finding that appellant had not established more than six percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

On April 10, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. Prior to a hearing being held, OWCP's hearing representative issued an August 9, 2017 decision remanding the case to OWCP for further development, including referral to a DMA for a permanent impairment evaluation which considered all of appellant's accepted left upper extremity conditions.

On remand, OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving in his capacity as a DMA.

In an August 24, 2017 report, Dr. Katz indicated that he had reviewed the relevant medical evidence of record, including the examination findings of Dr. Ohayon. He noted that he was applying the DBI method of evaluating permanent impairment under the sixth edition of the A.M.A., *Guides.* Per Table 15-2 (Digit Regional Grid) on page 391, appellant's diagnosed left thumb condition (healed minor soft tissue injury) fell under the class 1 default value of four percent permanent impairment of the left thumb. Dr. Katz determined that appellant had a functional history grade modifier of 0, physical examination grade modifier of 1, and clinical studies grade modifier of 0. Application of the net adjustment formula on page 411 required movement two spaces to the left of the default value on Table 15-2, thus yielding a value of two percent permanent impairment of the left thumb. Under Table 15-12 on page 421, the two percent permanent impairment of the left thumb converted to one percent permanent impairment of the left upper extremity. Dr. Katz indicated that he could not perform a permanent impairment evaluation of appellant's permanent impairment under the range of motion (ROM) method because the record did not currently contain range of motion findings for the left thumb which had been obtained in accordance with the strictures of the sixth edition of the A.M.A., *Guides.* He concluded that appellant had one percent permanent impairment of his left upper extremity under the DBI method of evaluating permanent impairment. Therefore, appellant did not have more than six percent permanent impairment of his left upper extremity, as had been granted by schedule award dated May 29, 2008.

By decision dated August 30, 2017, OWCP denied appellant's claim for an increased schedule award. It based this determination on the opinion of Dr. Katz, noting that he had found that appellant did not have more than six percent permanent impairment of the left upper extremity, as had been granted by schedule award dated May 29, 2008.

On September 8, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on February 16, 2018, counsel expressed his disagreement with OWCP's August 30, 2017 decision and noted that appellant's prior schedule award was for permanent impairment of the left upper extremity related to his left shoulder conditions, rather than those related to the left thumb.

By decision dated May 3, 2018, OWCP's hearing representative affirmed OWCP's August 30, 2017 decision, noting that appellant had not established more than six percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA,[6] and its implementing federal regulation,[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]

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]

Section 15.2e of the sixth edition of the A.M.A., *Guides* indicates that it is not uncommon for several diagnosed conditions to be present simultaneously in the upper extremity, and provides that the evaluator is expected to choose the most significant diagnosis and to rate only that diagnosis using the DBI rating method.[12]

[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); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* 494-531.

[11] *Id.* at 521.

[12] *See* A.M.A., *Guides* 390, section 15.2e.

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).
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> "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.*" (Emphasis in the original.)[13]
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> The Bulletin further advises:
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> "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 rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* do not allow for the use of ROM for the diagnosis in question, the DMA should independently calculate impairment using the DBI method and clearly explain in the report, citing applicable tables in Chapter 15 of the [A.M.A.,] *Guides*, that ROM is not permitted as an alternative rating method for the diagnosis in question.
>
> "If the rating physician provided an assessment using the DBI 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."[14]

FECA Bulletin No. 17-06 further provides that, 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

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

[14] *Id*.

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. 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.[15]

ANALYSIS

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

The Board has previously found that OWCP had 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 the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[16] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[17] 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 DMAs use both DBI and ROM methodologies interchangeably without a 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. The Board therefore found that OWCP should develop a consistent method for calculating permanent impairment for upper extremities, which could be applied uniformly.

As noted above, FECA Bulletin No. 17-06 provides that, if the rating physician provided an assessment using the DBI rating method, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the claims examiner.[18]

In August 2017, Dr. Katz, the DMA, indicated that he had reviewed the reports of Dr. Ohayon, the attending physician, and determined that appellant had one percent permanent impairment of his left upper extremity due to his left thumb condition, as calculated under the DBI rating method. Since he provided a rating using the DBI rating method, Dr. Katz was required to independently calculate appellant's permanent impairment using both the DBI and ROM methods and identify the higher rating for the claims examiner.[19] He indicated that the record did not

[15] *Id.*

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

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

[18] *See supra* note 16.

[19] *See supra* note 13.

contain adequate range of motion findings to conduct a permanent impairment rating under the ROM method. As noted above, FECA Bulletin No. 17-06 provides detailed instructions for obtaining sufficient evidence to conduct a complete permanent impairment evaluation, including referral for a second opinion evaluation in some cases. However, such instructions were not carried out in the present case. Therefore, this case requires further development of the medical evidence in accordance with FECA Bulletin No. 17-06.[20]

This case will therefore be remanded for application of FECA Bulletin No. 17-06, to include consideration of all of appellant's accepted conditions relating to the left upper extremity, *i.e.*, all of the accepted conditions of the left thumb and left shoulder/upper arm. After such further development of the medical evidence 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 May 3, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: January 11, 2019
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

[20] *Id.*