United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 19-1037**
	)	**Issued: November 6, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, 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:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 11, 2019 appellant, through counsel, filed a timely appeal from a March 4, 2019 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 permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On December 29, 2015 appellant, then a 56-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 24, 2015 he felt a pulling sensation in his neck and left shoulder after lifting several heavy mail sacks and placing them in hampers, and sustained neck and left shoulder injuries while in the performance of duty. He stopped work on December 24, 2015. OWCP accepted appellant's claim for sprain of muscle, fascia, and tendon of the left shoulder/upper arm, and sprain of joints and ligaments of the neck.[3]

On October 19, 2016 appellant filed a claim for a schedule award (Form CA-7) due to his accepted December 24, 2015 employment injury.

In an October 31, 2016 development letter, OWCP requested that appellant submit a medical report from an attending physician containing a rating of permanent impairment derived under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] It afforded him 30 days to submit the requested evidence.

Appellant submitted a February 22, 2017 report of Dr. Catherine Watkins Campbell, Board-certified in occupational and family medicine, who discussed appellant's medical history and reported findings upon physical examination, including range of motion (ROM) testing of the left shoulder. Dr. Watkins Campbell applied the diagnosis-based impairment (DBI) method for rating permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. She indicated that, under Table 15-5 (Shoulder Regional Grid) beginning on page 401, appellant's left shoulder sprain fell under class 1 for the class of diagnosis (CDX), a designation which warranted a default value of one percent permanent impairment of his left upper extremity. Dr. Watkins Campbell found that he had a grade modifier for functional history (GMFH) of 2 (due to a *Quick*DASH score of 41) and a grade modifier for physical examination (GMPE) of 1 (due to mild palpatory findings/ROM deficits). She determined that the grade modifier for clinical studies (GMCS) was not applicable. Application of the net adjustment formula resulted in movement one space to the right of the default value on Table 15-5 to the value of two percent permanent impairment. Therefore, Dr. Watkins Campbell concluded that appellant had two percent permanent impairment of his left upper extremity.[5]

[3] Appellant returned to limited-duty work on December 29, 2015, but he later stopped work again. OWCP paid him wage-loss compensation on the daily rolls for the period February 19 to March 15, 2016.

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

[5] Dr. Watkins Campbell inadvertently misstated that the two percent permanent impairment rating was for the right upper extremity, but the content of the rest of her report shows that the rating was for the left upper extremity.

On May 10, 2017 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA) for OWCP, and requested that he evaluate Dr. Watkins Campbell's February 22, 2017 report and provide an opinion regarding the permanent impairment of appellant's upper extremities.

In a May 11, 2017 report, the DMA indicated that, for the purposes of an appropriate schedule award rating, Dr. Watkins Campbell's February 22, 2017 report was deficient because she did not obtain ROM findings for appellant's right shoulder in order to define "normal" ROM by comparing the ROM findings for that shoulder to the ROM findings for the injured left shoulder.[6] He recommended that she provide a supplemental report addressing this concern and indicated that, if she were unable to provide such a report, OWCP should refer her to an appropriate specialist for a second opinion examination.

In letters dated June 14, 2017 and January 31, 2018, OWCP requested that Dr. Watkins Campbell produce a supplemental report as recommended by the DMA. In each letter, it afforded her 30 days to respond. Dr. Watkins Campbell did not respond to OWCP's request and, therefore, OWCP referred appellant to Dr. William R. Bohl, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that Dr. Bohl evaluate whether appellant had permanent impairment of his upper extremities under the standards of the sixth edition of the A.M.A., *Guides.*

In an April 25, 2018 report, Dr. Bohl discussed appellant's factual and medical history and reported the findings of appellant's physical examination.[7] He indicated that appellant's left shoulder had good strength and he noted that appellant had loss of ROM in both shoulders.[8] Dr. Bohl advised that, under FECA, evaluations of extremity permanent impairment originating in the spine due to spinal nerve deficits were made according to *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).[9] He opined that, because appellant had no objective evidence of sensory or motor loss upon examination which would be attributable to the cervical spine, appellant's permanent impairment under *The Guides Newsletter* due to his accepted cervical sprain would be zero percent. Dr. Bohl then indicated that he was applying the DBI method of rating the permanent impairment of appellant's left upper extremity due to his accepted left shoulder sprain. He noted that, under Table 15-5 beginning on page 401 of the sixth edition of the A.M.A., *Guides,* appellant's left shoulder sprain fell under class 1 for the CDX, thereby warranting a default value of one percent permanent impairment.

[6] The DMA referenced Section 15.7a on page 461 of the sixth edition of the A.M.A., *Guides.*

[7] Dr. Bohl inadvertently dated his report as being prepared on April 25, 2017, rather than giving it the proper date of April 25, 2018.

[8] Dr. Bohl used the highest values for the three measurements taken for each type of shoulder motion. For the left shoulder, appellant had flexion of 140 degrees, extension of 70 degrees, abduction of 125 degrees, adduction of 50 degrees, internal rotation of 68 degrees, and external rotation of 76 degrees. For the right shoulder, he had flexion of 133 degrees, extension of 68 degrees, abduction of 115 degrees, adduction of 40 degrees, internal rotation of 68 degrees, and external rotation of 80 degrees. Dr. Bohl also noted that appellant did not have any motor/sensory loss stemming from his cervical spine.

[9] *See infra* note 18.

Dr. Bohl further found that appellant had a GMFH of 1 because he had pain/symptoms with vigorous activity and was able to perform self-care activities independently. He found that appellant had a GMPE of 0 due to the fact that he did not have instability or significant loss of motion compared to the opposite shoulder, and that he had a GMCS of 0 because there were no clinical studies of the left shoulder. Application of the net adjustment formula resulted in movement two spaces to the left of the default value on Table 15-5 to the value of zero percent permanent impairment. Dr. Bohl then applied the ROM impairment rating method under Table 15-34 on page 477 and concluded that appellant had no permanent impairment of the left upper extremity under this rating method because appellant had similar ROM losses in his injured and uninjured shoulders. Therefore, he concluded that appellant had zero percent permanent impairment of each upper extremity.

OWCP referred appellant's case to the DMA and requested that he evaluate Dr. Bohl's April 25, 2018 report and provide an opinion regarding the permanent impairment of appellant's upper extremities. On May 6, 2018 the DMA advised that he agreed with Dr. Bohl's assessment that appellant had zero percent permanent impairment of each upper extremity.

By decision dated May 16, 2018, OWCP denied appellant's schedule award claim because he did not establish permanent impairment of a scheduled member or function of the body. It based its finding on the opinions of Dr. Bohl and the DMA.

On May 22, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on October 11, 2018, appellant testified that he continued to have neck and shoulder symptoms. OWCP's hearing representative indicated that the case record would be held open for 30 days to afford appellant an opportunity to submit additional medical evidence, but appellant did not submit such evidence during this period.

By decision dated December 18, 2018, OWCP's hearing representative affirmed the May 16, 2018 decision.

On January 29, 2019 appellant, through counsel, requested reconsideration of the December 18, 2018 decision.

Appellant submitted a November 19, 2018 report from Dr. Sami Moufawad, Board-certified in physical medicine and rehabilitation, who discussed appellant's factual and medical history and reported the findings of his physical examination.[10] Dr. Moufawad indicated that appellant had tenderness to palpation over the anterior aspect of the left shoulder and that he had loss of ROM in both shoulders.[11] He advised that he was applying the DBI method of rating the

[10] Appellant reported to Dr. Moufawad that he had limitations with activities of daily living requiring heavy functionality, including lifting more than 25 pounds. Dr. Moufawad indicated that there was a good correlation between appellant's answers on the activities of daily living questionnaire and on the *Quick*DASH survey.

[11] Dr. Moufawad used the highest values for the three measurements taken for each type of shoulder motion. For the left shoulder, appellant had flexion of 140 degrees, extension of 40 degrees, abduction of 100 degrees, adduction of 50 degrees, internal rotation of 68 degrees, and external rotation of 76 degrees. For the right shoulder, he had flexion of 150 degrees, extension of 40 degrees, abduction of 90 degrees, adduction of 20 degrees, internal rotation of 80 degrees, and external rotation of 70 degrees.

permanent impairment of appellant's left upper extremity due to his accepted left shoulder sprain. Dr. Moufawad noted that, under Table 15-5 of the sixth edition of A.M.A., *Guides*, appellant's left shoulder sprain fell under class 1 for the CDX, thereby warranting a default value of one percent permanent impairment. He found that appellant had a GMFH of 2 (due to a *Quick*DASH score of 43), a GMPE of 1 (due to palpatory findings), and a GMCS of 0 (due to lack of clinical studies). Application of the net adjustment formula resulted in no movement from the default value of one percent on Table 15-5. Dr. Moufawad then applied the ROM impairment rating method under Table 15-34 and concluded that appellant had no permanent impairment of the left upper extremity under this rating method due to the fact that he had similar ROM losses in his injured and uninjured shoulders. Therefore, he concluded that, due to his left shoulder sprain, appellant had one percent permanent impairment of his left upper extremity as rated under the DBI method.

By decision dated March 4, 2019, OWCP denied modification of its December 18, 2018 decision. It found that Dr. Moufawad's impairment rating was invalid because he did not explain why he determined that appellant had a GMFH of 2 instead of 1.

LEGAL PRECEDENT

The schedule award provisions of FECA[12] and its implementing regulations[13] 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 to all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[14] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[15]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[16] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[17] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404.

[14] *Id. See also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

[15] 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).

[16] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[17] *Supra* note 15 at Chapter 2.808.5c(3) (March 2017).

rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[18]

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 shoulder, the relevant affected portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[19] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[20]

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."[21]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he has upper extremity permanent impairment due to his accepted cervical sprain. The Board further finds that the case is not in posture for decision regarding whether he has met his burden of proof to establish upper extremity permanent impairment due to his accepted left shoulder sprain.

Preliminarily, the Board finds that appellant has not established that he has upper extremity permanent impairment due to his accepted cervical sprain. In an April 25, 2018 report, Dr. Bohl, OWCP's referral physician, properly noted that, under FECA, evaluations of extremity permanent impairment originating in the spine due to spinal nerve deficits were made according to *The Guides Newsletter*.[22] He correctly opined that, because appellant had no objective evidence of sensory or motor loss upon examination which would be attributable to the cervical spine, his permanent impairment under *The Guides Newsletter* due to his accepted cervical sprain would be zero percent. The Board notes that the case record does not contain any other report evaluating extremity permanent impairment originating in the spine under the standards of *The Guides Newsletter* and the weight of the medical opinion evidence rests with Dr. Bohl's opinion with respect to this matter.

[18] *Supra* note 15 at Chapter 3.700, Exhibit 4 (January 2010).

[19] *See* A.M.A., *Guides* (6th ed. 2009) 405-12. Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, permanent impairment may alternatively be assessed using section 15.7 (ROM impairment). Such a ROM impairment stands alone and is not combined with a DBI rating. *Id.* at 401-05, 475-78.

[20] *Id.* at 23-28.

[21] 5 U.S.C. § 8123(a).

[22] *See supra* note 18.

However, the Board further finds that there is a conflict in the medical opinion evidence regarding whether appellant has upper extremity permanent impairment due to his accepted left shoulder sprain.[23]

In his April 25, 2018 report, Dr. Bohl concluded that appellant had zero percent permanent impairment of his left upper extremity due to his accepted left shoulder sprain. He noted that, under the DBI rating method found at Table 15-5, appellant's left shoulder sprain fell under class 1 for the CDX, thereby warranting a default value of one percent permanent impairment.[24] Dr. Bohl found that appellant had a GMFH of 1 because he had pain/symptoms with vigorous activity and was able to perform self-care activities independently. He found that appellant had a GMPE of 0 (due to no instability or significant loss of motion compared to the opposite shoulder) and a GMCS of 0 (due to a lack of clinical studies). Application of the net adjustment formula resulted in movement two spaces to the left of the default value on Table 15-5 to the value of zero percent permanent impairment. Dr. Bohl applied the ROM impairment rating method under Table 15-34 and concluded that appellant had no permanent impairment of the left upper extremity under this rating method due to the fact that he had similar ROM losses in his injured and uninjured shoulders.[25]

In contrast, Dr. Moufawad, an attending physician, determined in a November 19, 2018 report that, due to his left shoulder sprain, appellant had one percent permanent impairment of his left upper extremity as rated under the DBI method. He noted that, under Table 15-5, appellant's left shoulder sprain fell under class 1 for the CDX, thereby warranting a default value of one percent permanent impairment. Dr. Moufawad found that appellant had a GMFH of 2 (due to a *Quick*DASH score of 43), a GMPE of 1 (due to palpatory findings), and a GMCS of 0 (due to a lack of clinical studies).[26] Application of the net adjustment formula resulted in no movement from the default value of one percent on Table 15-5.[27]

Consequently, the case must be referred to an impartial medical specialist to resolve the above-described conflict in the medical opinion evidence between Dr. Bohl and Dr. Moufawad regarding appellant's permanent impairment. On remand OWCP shall refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After carrying out this development, it shall issue a *de novo* decision regarding appellant's claim.

[23] *See supra* note 21.

[24] *See* A.M.A., *Guides* 401, Table 15-5.

[25] *See id.* at 463, 477.

[26] OWCP had indicated that Dr. Moufawad did not explain his GMFH score of 2, but he did in fact explain his score by noting that it was based on a *Quick*DASH score of 43. *See id.* at 406, Table 15-7.

[27] Dr. Moufawad also applied the ROM impairment rating method under Table 15-34 and concluded that appellant had no permanent impairment of the left upper extremity under this rating method.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he has upper extremity permanent impairment due to his accepted cervical sprain. The Board further finds that the case is not in posture for decision regarding whether he has met his burden of proof to establish upper extremity permanent impairment due to his accepted left shoulder sprain.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for action consistent with this decision.

Issued: November 6, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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