United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 19-0144**
	)	**Issued: October 23, 2019**
DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINERING CMD-STATION, San Diego, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 25, 2018 appellant, through counsel, filed a timely appeal from an August 27, 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 one percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On January 27, 2014 appellant, then a 26-year-old high-voltage electrician apprentice, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a left shoulder injury while in the performance of duty when he lifted a box above his head. On the reverse side of the claim form, the employing establishment indicated that he stopped work on January 27, 2014. On March 26, 2014 OWCP accepted appellant's claim for left sprain/tear of glenoid labrum lesion. On April 4, 2014 appellant underwent an authorized arthroscopic surgery for left shoulder posterior labral tear. He received wage-loss compensation on the supplemental rolls from April 4 to 25, 2014.

On September 12, 2014 appellant underwent a second authorized left shoulder arthroscopic procedure, by Dr. Anshuman Singh, a Board-certified orthopedic surgeon. He related that he had debrided a large knot of labral sutures, and found no other loose bodies for debridement. Appellant received benefits on the supplemental rolls for temporary total disability from September 12 to October 3, 2014.

On April 5, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a permanent impairment rating assessment dated October 21, 2015, Dr. Mesfin Seyoum, a family medicine practitioner specializing in pediatrics, noted appellant's left shoulder range of motion (ROM) findings, but using the diagnosis-based impairment (DBI) methodology, he rated her permanent impairment based upon his diagnosis of left shoulder loose body. Pursuant to Table 15-5 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent* impairment (A.M.A., *Guides*),[3] he found that she had seven permanent impairment of the left upper extremity. Dr. Seyoum related that appellant was classified as Class 1, grade C, for five percent permanent impairment due to left shoulder loose body. He applied a grade 2 modifier for functional history (GMFH) based on an upper limb questionnaire (*Quick*DASH) score of 54; grade 1 modifier for physical examination (GMPE) based on mild tenderness on palpation and mildly decreased left shoulder ROM; grade 2 modifier (GMCS) based on magnetic resonance imaging scan findings of Bankart lesion and loose body; for a net adjustment of 2, and a total left shoulder permanent impairment of seven percent.

In a report dated April 25, 2016, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), indicated that he reviewed the medical record and statement of accepted facts (SOAF). He rated appellant's permanent impairment using the ROM methodology and related that she had three percent left upper extremity permanent impairment for loss of flexion, three percent impairment for loss of abduction, and one percent impairment for loss of external rotation of the shoulder, resulting in seven percent permanent impairment of the

[3] A.M.A., *Guides* (6th ed. 2009), page 405.

left upper extremity. Dr. Harris related that appellant's seven percent permanent impairment of the left upper extremity was the sole impairment resulting from the accepted January 27, 2014 employment incident, and her date of maximum medical improvement (MMI) was October 21, 2015, the date of Dr. Seyoum's evaluation.

In a report dated June 21, 2016, a second DMA, Dr. David H. Garelick, a Board-certified orthopedic surgeon, indicated that, based on Dr. Seyoum's October 21, 2015 report, appellant had no ratable impairment based on DBI as the evidence did not indicate that she still had a left shoulder loose body. He also found that Dr. Seyoum's report related that she had full ROM of his left shoulder, with no weakness or instability. Dr. Garelick concluded that, based upon the lack of objective findings, appellant had no residual permanent impairment of the left shoulder.

By decision dated September 27, 2016, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment to a scheduled member or function of the body due to his accepted January 27, 2014 employment injury.

On October 3, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

By decision dated March 28, 2017, OWCP's hearing representative vacated the September 27, 2016 decision and remanded the case to OWCP for a second opinion evaluation.

On April 3, 2017 OWCP referred appellant to Dr. Jon P. Kelly, a Board-certified orthopedic surgeon, for a second opinion evaluation to evaluate her employment-related condition and any resulting permanent impairment, in accordance with the sixth edition of A.M.A., *Guides*.

In a May 24, 2017 report, Dr. Kelly noted that appellant had undergone left shoulder arthroscopic procedures on April 4 and September 12, 2014. He described his review of the SOAF and medical record. Dr. Kelly indicated that appellant complained of inability to abduct or forward flex his left shoulder past 90 degrees and general pain in his left shoulder. Examination findings revealed no atrophy of the trapezius, deltoid, biceps, triceps, supraspinatus, or infraspinatus muscles. Dr. Kelly also noted that appellant had full ROM except for loss of approximately 5 degrees of internal rotation in his left shoulder. He then utilized the DBI method and rated appellant's left shoulder impairment under Table 15-5 for labral lesion.[4] While the default rating was three percent Dr. Kelly concluded that appellant had one percent permanent impairment as appellant had regained full function of the left shoulder. He also noted that the loose body in appellant's left shoulder had been removed.

By letter dated July 3, 2017, OWCP requested clarification of Dr. Kelly's May 24, 2017 second opinion report as he had only provided one ROM measurement, but OWCP now required three ROM measurements for evaluation of permanent impairment.

In a report dated August 22, 2017 and in response to OWCP's letter dated July 3, 2017, Dr. Kelly clarified his initial second opinion evaluation dated May 24, 2017. He related that he

[4] Table 15-5 at page 404.

had performed three ROM measurements and that appellant had 75 degrees of internal rotation of the left shoulder, therefore, appellant had one percent permanent impairment of the left shoulder using the ROM rating methodology.[5] Dr. Kelly concluded that appellant had an upper extremity permanent impairment rating of three percent, based upon DBI methodology under Table 15-5. He related that under Table 15-5 appellant's class of diagnosis (CDX) for the diagnosis of labral lesion would be Class 1 for residual symptoms, with a default rating of three percent impairment. Applying grade 1 modifier factors for mild findings regarding functional history, physical examination, and clinical studies, he concluded that appellant had a three percent permanent impairment of the upper extremity. Dr. Kelly also noted that appellant reached MMI on November 3, 2014.

In a report dated October 10, 2017, Dr. Garelick, serving as a DMA, indicated that he had reviewed the SOAF and medical records provided by OWCP. He related that appellant's physical examination demonstrated well-healed arthroscopic portals, and that there was no mention of any residual instability. Dr. Garelick noted that there was no atrophy of the shoulder musculature, the left shoulder ROM demonstrated 180 degrees of forward flexion, 50 degrees of extension, 180 degrees of abduction, 50 degrees of adduction, 60 degrees of external rotation, and 75 degrees of internal rotation. He utilizing a DBI rating method, recommended zero percent left upper extremity permanent impairment because there were no residual findings associated with any residual disability as noted in Table 15-5 of the A.M.A., *Guides*. When utilizing a ROM measurement, Dr. Garelick found one percent left upper extremity permanent impairment, and because the ROM method awarded more than the DBI method, the ROM method should be used. He found an impairment rating of one percent, and noted that appellant reached MMI on August 22, 2017.

By decision dated October 20, 2017, OWCP granted appellant a schedule award for one percent permanent impairment of the left upper extremity. The period of the award ran from August 22 to September 12, 2017. OWCP found that, in reviewing the evidence, the DMA, Dr. Garelick, determined that Dr. Kelly had incorrectly applied the A.M.A., *Guides* to the findings on examination. It found, therefore, that the weight of the medical evidence regarding the percentage of permanent impairment rested with Dr. Garelick, serving as the DMA, as he had correctly applied the A.M.A., *Guides* to the examination findings.

On November 2, 2017 appellant, through counsel, requested a telephonic hearing with an OWCP hearing representative.

In a report dated December 6, 2017, Dr. Seyoum indicated that the DBI calculation could be used in appellant's case, because she had residual symptoms of mild left shoulder pain aggravated by activities such as overhead reaching, lifting, or with cold weather; as well as limitations of his activities of daily living. He found that, upon recalculation, according to the CDX, appellant was classified as having Class 1 with grade C, three percent upper extremity impairment due to left shoulder labral lesion; according to the GMFH, appellant had grade modifier 2 based on his *Quick*DASH score of 54; according to the GMPE adjustment, appellant had grade modifier 1 due to mild tenderness on palpation and mildly decreased left shoulder ROM;

[5] Table 15-34 at page 475.

and a net adjustment of 1. Dr. Seyoum found that she had four percent left upper extremity permanent impairment based on the three percent upper extremity impairment for the CDX of the left shoulder plus the net adjustment of one percent. He also found that regarding the ROM criteria there was one percent upper extremity impairment due to appellant's limitation in internal rotation of his left shoulder. Dr. Seyoum argued that the DBI method's calculation of four percent left upper extremity permanent impairment should be used because the ROM method resulted in a lower impairment rating.

By decision dated March 5, 2018, OWCP's hearing representative set aside the October 20, 2017 decision and remanded the case to OWCP for further development. It indicated that OWCP should refer the case back to the DMA to review Dr. Seyoum's December 6, 2017 report and for further consideration of Dr. Kelly's DBI impairment rating.

In a report dated March 16, 2018, Dr. Garelick, serving as the DMA, indicated that he had reviewed the SOAF and medical records provided by OWCP. In utilizing a DBI rating method, he recommended zero percent left upper extremity permanent impairment because there were no residual findings associated with any residual disability as noted in Table 15-5 of the A.M.A., *Guides*. When utilizing a ROM measurement, Dr. Garelick found one percent left upper extremity permanent impairment, and because the ROM method awarded more than the DBI method, the ROM method should be used. He concluded that appellant had one percent permanent impairment of the left shoulder, and noted that appellant reached MMI on August 22, 2017. In addressing Dr. Seyoum's DBI rating from his December 6, 2017 report, Dr. Garelick responded that the A.M.A., *Guides* did not state that the DBI which awarded the highest percent permanent impairment be chosen, but rather stated that the most significant diagnosis was the one that should be used. He contended that appellant had a posterior labral repair, did not have a superior labrum anterior posterior tear, and given that appellant had no residual instability, a zero percent left upper extremity permanent impairment rating was awarded for this particular DBI as noted under the "Unidirectional shoulder instability" section in Table 15.5, p.404 of the A.M.A., *Guides*.

By decision dated March 27, 2018, OWCP relying on the opinion of the DMA, granted appellant a schedule award for one percent permanent impairment of the left upper extremity. The period of award ran from August 22 to September 12, 2017.

On April 4, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on July 24, 2018.

By decision dated August 27, 2018, OWCP's hearing representative affirmed OWCP's March 27, 2018 decision denying appellant's claim for additional schedule award. It found that the schedule award determination complied with the requirements of FECA Bulletin 17-06 because Dr. Garelick calculated impairment ratings using both the DBI and ROM methods. The hearing representative also found that the evidence supported that the DMA provided a well-rationalized impairment rating according to the appropriate portions of the A.M.A., *Guides*, and, therefore, constituted the weight of the medical opinion evidence.

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]

The sixth edition requires identifying the impairment class for the diagnosed condition CDX, which is then adjusted by GMFH, GMPE, and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

> "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.)[11]

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 [claims examiner] CE."[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).

[10] A.M.A., *Guides* 383-492.

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

[12] *Id*.

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[13] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[14]

ANALYSIS

The Board finds that this case is not in posture for decision due to a conflict in medical opinion.

In his May 24, 2017 second opinion evaluation, Dr. Kelly noted that appellant had full ROM except for loss of approximately 5 degrees of internal rotation in his left shoulder. He then utilized the DBI method and rated appellant's left shoulder impairment under Table 15-5 for labral lesion.[15] While the default rating was three percent Dr. Kelly concluded that appellant had one percent permanent impairment as he had regained full function of the left shoulder. On August 22, 2017 in response to OWCP's letter dated July 3, 2017, Dr. Kelly clarified his May 24, 2017 second opinion evaluation. He related that he had performed three ROM measurements and that appellant had 75 degrees of internal rotation of the left shoulder, therefore, appellant had one percent permanent impairment of the left shoulder using the ROM rating methodology.[16] Dr. Kelly also clarified that appellant had an upper extremity permanent impairment rating of three percent, based upon DBI methodology under Table 15-5. He explained that the default rating for a Class 1, grade C, labral lesion was three percent, and that application of the net adjustment formula for appellant's mild residuals symptoms for GMFH, GMPE, and GMCS resulted in the three percent default permanent impairment rating.

In his report dated December 6, 2017, Dr. Seyoum found that, upon recalculation, according to the CDX, appellant was classified as having Class 1 with grade C, three percent upper extremity impairment due to left shoulder labral lesion; according to the GMFH, appellant had grade modifier 2 based on his *Quick*DASH score of 54; according to the GMPE adjustment, appellant had grade modifier 1 due to mild tenderness on palpation and mildly decreased left shoulder ROM; and a net adjustment of 1. He found that appellant had four percent left upper extremity permanent impairment based on the three percent upper extremity impairment for the CDX of the left shoulder plus the net adjustment of one percent. Dr. Seyoum also found that regarding the ROM criteria there was one percent upper extremity impairment due to appellant's limitation in internal rotation of his left shoulder. He argued that the DBI method's calculation of four percent left upper extremity permanent impairment should be used because the ROM method resulted in a lower impairment rating.

The Board finds that a conflict was created between Dr. Kelly, who assigned appellant's left shoulder labral tear a GMFH of 1, based upon mild findings, and Dr. Seyoum who assigned a

[13] 5 U.S.C. § 8123(a); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019).

[14] *See A.G., id*.

[15] Table 15-5 at page 404.

[16] Table 15-34 at page 475.

GMFH of 2, based upon appellant's *Quick*DASH score. As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.[17] The Board finds that there is an unresolved conflict in the medical evidence between Dr. Kelly and Dr. Seyoum regarding the calculated percentage of permanent impairment for appellant's labral region; Dr. Kelly determined a three percent permanent impairment rating and Dr. Seyoum determined a four percent permanent impairment rating. Therefore, the case must be remanded to OWCP for referral of appellant to an IME for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).[18] After such further development as OWCP deems necessary, it 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 27, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 23, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[17] *G.W.*, Docket No. 19-0063 (issued June 21, 2019).

[18] *Id*.