United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 19-0922**
	)	**Issued: October 4, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Houma, LA, Employer	)	

Appearances:
Joanne M. Wright, 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 March 26, 2019 appellant, through counsel, filed a timely appeal from a December 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 to consider 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 his bilateral upper extremities, warranting a schedule award.

FACTUAL HISTORY

On December 1, 2001 appellant, then a 54-year-old full-time letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, a string attached along a property line caused him to fall on his right shoulder while in the performance of duty. He also alleged that his neck was "bothering him." OWCP accepted the claim for neck sprain and right shoulder tendinitis. It subsequently accepted that appellant sustained a recurrence of disability on December 31, 2001 causally related to his accepted December 1, 2001 employment injuries.

On March 16, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated March 21, 2017, OWCP advised appellant of the deficiencies in his schedule award claim. It requested that he submit an impairment evaluation from his treating physician addressing whether he had attained maximum medical improvement (MMI) with an impairment rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] OWCP afforded appellant 30 days to respond.

In response, appellant submitted a report dated April 7, 2017 by Dr. Rima El-Abassi, an attending neurologist. The report noted that appellant was evaluated for residual estimated maximum functional capacities following an injury to the cervical spine and upper extremities resulted from his 2001 work-related fall. Appellant underwent C5-6, C6-7 anterior cervical discectomy and fusion (ACDF) in 2005 due to central canal stenosis. He was examined and diagnosed with having cervical stenosis with myelopathy. Appellant's clinical condition was assumed to be stabilized and not likely to improve with surgical intervention or active medical treatment. Only medical maintenance care was warranted. The report indicated that the degree of impairment was not likely to change substantially within the next year. Appellant was not likely to suffer sudden or subtle incapacitation. The report noted that the diagnosis-based impairment (DBI) rating method of the sixth edition of the A.M.A., *Guides* was used to calculate appellant's bilateral upper extremity permanent impairment. Under Table 15-20, page 434, a diagnosis of cervical stenosis with upper extremity peripheral nerve impairment impacting strength and range of motion (ROM) (brachial plexus impairment C5 through C8, and Tl) was identified and represented a class 1, grade C impairment. Based on Table 15-7, a grade modifier 2 was assigned for functional history (GMFH). No grade modifiers for physical examination (GMPE) and clinical studies (GMCS) were assigned under Table 15-8 and Table 15-9, respectively. The net adjustment formula, page 411, was applied resulting in a total net adjustment of +2, which required movement of the grade C impairment to grade E, for 13 percent permanent impairment of each upper extremity. The impairment ratings for each upper extremity were combined, page 604, which yielded 24 percent permanent impairment of the upper extremities and equated to 14 percent whole

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

person permanent impairment under Table 15-11, page 420. Alternatively, the ROM rating method was utilized to rate impairment of each shoulder due to the absence of a recent electromyogram/nerve conduction velocity (EMG/NCV) study. Under Table 15-34, page 475, appellant had 10 percent permanent impairment of the right upper extremity due to addition of the following ROM deficits for the right shoulder: 130 degrees flexion; 40 degrees extension; 130 degrees abduction; 25 degrees adduction; 55 degrees internal rotation; and 75 degrees external rotation. Under the same table, he had 11 percent permanent impairment of the left upper extremity due to addition of the following ROM deficits for the left shoulder: 125 degrees flexion; 55 degrees extension; 100 degrees abduction; 30 degrees adduction; 40 degrees internal rotation; and 85 degrees external rotation. These impairment ratings for right and left upper extremities were combined, page 604, which yielded 20 percent upper extremity permanent impairment which equated to 12 percent permanent whole person impairment. Dr. El-Abassi asserted that the DBI method should be used in this particular case because it was a higher rating than the ROM method. In addition, the report noted that appellant had hereditary spastic paraplegia (HSP) and was chronically disabled by his condition. Appellant also had a cervical strain with irreversible weakness in the upper extremities.

On May 17, 2017 OWCP routed Dr. El-Abassi's report, a statement of accepted facts (SOAF) of even date, the case file, and a set of questions, to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination of permanent impairment of appellant's right upper extremity and his date of MMI.

In a report dated May 18, 2017, Dr. Katz noted that he had reviewed Dr. El-Abassi's report and the SOAF. He disagreed with her impairment ratings. Dr. Katz explained that the use of Table 15-20, (Brachial Plexus Impairment: Upper Extremity Impairments), was not supported by the accepted condition in appellant's claim. Dr. Katz also explained that a diagnosed injury originating in the spine may be considered only to the extent that it results in permanent impairment of the extremities, generally manifesting as spinal nerve impairment. In addition, he reasoned that spinal nerve impairment should be determined using the method described in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/ August 2009) (*The Guides Newsletter*), Proposed Tables One and Two.[4] Dr. Katz further reasoned that given the sole cervical spine accepted diagnosis of neck sprain, which was a self-limited diagnosis, it was unclear if, in fact, the cervical fusion performed was authorized under appellant's claim. He recommended a second opinion evaluation.

On June 13, 2017 OWCP referred appellant, together with a SOAF, the medical record, and series of questions, to Dr. Christopher E. Cenac, Sr., a Board-certified orthopedic surgeon, for a second opinion impairment evaluation.

Dr. Cenac, in a report dated July 11, 2017, noted that he examined appellant on July 10, 2017 for the purposes of assessing an impairment rating. He also noted that he had reviewed the SOAF and medical record. Dr. Cenac indicated that appellant related that he had retired from the employing establishment on September 1, 2003. He reported appellant's complaints of progressive numbness over the past several years in his right hand fingers which caused him to

[4] Table 1 and Table 2, *The Guides Newsletter*.

awaken. Dr. Cenac also had to shake both hands, more so on the right than the left, to return feeling into his hands. Appellant had no specific complaints of neck or shoulder dysfunction or symptoms. On physical examination, Dr. Cenac reported normal reflexes in the upper extremities and brisk reflexes in both lower extremities. There were no sensory deficits to pinprick or light touch in the arms, legs, or feet. There were normal findings related to the left hand. There was slightly diminished sensation in the right index finger. Intrinsic and pinch function were normal. Fine and gross dexterity were also normal. There was no atrophy in the upper extremities or hands by direct measurement. Motion was near normal in all planes of the cervical spine. There was a healed anterior neck incision. There was no point tenderness in the cervical musculature and no shoulder girdle atrophy. There was symmetrical near normal full motion and strength in both shoulders. A Tinel's test was very positive at the right elbow, markedly positive at the right wrist, and mildly positive at the left elbow and left wrist. Cervical spine x-ray studies revealed a solid fusion at C6-7 without instrumentation and a solid fusion at C5-6 with anterior instrumentation. Disc spaces above the fusion were normal. Dr. Cenac reported that there were no diagnostic records to substantiate ongoing medical treatment for appellant's cervical spine after the June 7, 2005 fusion. He noted that appellant confirmed that the cervical surgical procedures he underwent in May 2003 and on June 7, 2005 were not authorized under the instant claim. Dr. Cenac agreed with Dr. Katz that appellant's initial diagnosis of neck sprain was self-limited and had long since resolved. Similarly, he maintained that his diagnosis of right shoulder tendinitis had also resolved. Dr. Cenac advised that appellant had no evidence of residuals in the cervical spine or right shoulder causally related to the accepted December 1, 2001 employment incident. He concluded that appellant had no permanent impairment causally related to the accepted employment incident.

OWCP, in a letter dated August 8, 2017, requested that appellant submit a report from Dr. El-Abassi addressing Dr. Cenac's July 11, 2017 findings. It afforded him 30 days to respond.

On September 12, 2017 OWCP requested that Dr. Katz review Dr. Cenac's findings. In a letter dated September 14, 2017, Dr. Katz indicated that he had reviewed Dr. Cenac's report and agreed with his opinion that appellant had no bilateral upper extremity permanent impairment. Utilizing Table 15-5, page 402, Shoulder Regional Grid, of the sixth edition of the A.M.A., *Guides*, he found that a diagnosis of tendinitis was a class zero impairment defined as no significant objective findings at MMI with an assigned default value of zero percent. Dr. Katz noted that there was no net adjustment value, resulting in zero percent permanent impairment of the right and left upper extremities. He determined that, under proposed Table 1, Spinal Nerve Impairment: Upper Extremity Impairment, *The Guides Newsletter*, spinal nerves C5, C6, C7, C8, and T1 with no motor or sensory deficit represented a class zero impairment with a default value of zero percent. Dr. Katz again noted that there was no net adjustment value, resulting in zero percent permanent impairment of the cervical spine. He opined that his determination was supported by the records reviewed and consistent with the methodology set forth by the sixth edition of the A.M.A., *Guides*. Specifically, Dr. Katz maintained that grade modifiers for functional history, physical examination, and clinical studies were assigned according to the parameters set forth in Table 15-7, Table 15-8, and Table15-9 and the tables in *The Guides Newsletter*. He advised that the medical evidence of record was not sufficient to render a rating based on the ROM rating method. Dr. Katz reasoned that the record/report in question failed to document three independent measurements of each arc with the greatest ROM used for the determination of impairment. He further reasoned that a complete arc of motion was not supplied in all planes for which impairment may be rating per the ROM impairment table. Dr. Katz noted that there were no discrepancies

between his bilateral upper extremity impairment ratings and those of Dr. Cenac. He reported that appellant had reached MMI on July 10, 2017, the date of Dr. Cenac's impairment evaluation.

In a letter dated October 26, 2017, OWCP requested that appellant obtain an additional report from Dr. El-Abassi addressing Dr. Katz's September 14, 2017 findings. It afforded him 30 days to respond.

In response to OWCP's August 8, 2017 letter, appellant submitted an undated letter from Dr. El-Abassi. Dr. El-Abassi advised that appellant was disabled as a result of his preexisting genetic disorder, HSP, superimposed by the consequences of the "MVC" and his cervical strain that required surgery. She continued to agree with her earlier evaluation of his disability status.

By decision dated December 13, 2017, OWCP denied appellant's schedule award claim, finding that the medical evidence was insufficient to establish that he had sustained permanent impairment of a scheduled member or function of the body.

On October 15, 2018, appellant requested reconsideration. He contended that the weight of the medical opinion evidence did not rest with Dr. Katz and Dr. Cenac because they were given insufficient and inaccurate information. Appellant further contended that the SOAF failed to provide information regarding his recurrence of disability.

OWCP, by decision dated December 19, 2018, denied modification of its December 13, 2017 decision, finding that appellant did not submit any additional medical evidence providing an impairment rating under the A.M.A., *Guides*. It determined that the weight of the medical evidence continued to rest with the opinions of Dr. Katz and Dr. Cenac based on the correct evidence of record.

LEGAL PRECEDENT

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.[5] For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.[6]

The schedule award provisions of FECA,[7] and its implementing federal regulations,[8] 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

[5] *L.C.*, Docket No. 15-1671 (issued May 24, 2016); *Veronica Williams*, 56 ECAB 367 (2005).

[6] *F.E.*, Docket No. 17-0584 (issued December 18, 2017).

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.[11] In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule, regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity, even though the cause of the impairment originated in the spine.[12]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.[13] The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.[14] In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[15]

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class of diagnosis (CDX) condition, which is then adjusted by grade modifiers based on functional history, physical examination, and clinical studies.[16] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[17]

The A.M.A., *Guides* also provide that the ROM impairment method is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other

[9] *Id*. at § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] *See B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *Pamela J. Darling*, 49 ECAB 286 (1998).

[12] *J.M., id.; Thomas J. Engelhart*, 50 ECAB 319 (1999).

[13] *See G.N.*, Docket No. 10-0850 (issued November 12, 2010); *see also supra* note 9 at Chapter 3.700, Exhibit 1, n.5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[14] *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

[15] *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

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

[17] *Id*. at 411.

diagnosis-based sections are applicable. If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and combined.[18] Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.[19]

Regarding the application of ROM or DBI 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).
>
> "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*."[20] (Emphasis in the original.)

ANALYSIS

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

OWCP accepted appellant's claim for neck sprain and right shoulder tendinitis. Appellant filed a claim for a schedule award due to permanent impairments resulting from these accepted conditions.

OWCP properly routed Dr. El-Abassi's report to the DMA, Dr. Katz.[21] In a May 18, 2017 report, Dr. Katz disagreed with Dr. El-Abassi's impairment ratings. He explained that her use of Table 15-20, Brachial Plexus Impairment: Upper Extremity Impairments, was not supported by the condition accepted by OWCP. Dr. Katz further explained that a diagnosed employment injury originating in the spine may only be considered to the extent that it results in permanent impairment of the extremities, generally reflected as spinal nerve impairment, and that it was to be determined

[18] *Id*. at 473.

[19] *Id*. at 473-74.

[20] FECA Bulletin No. 17-06 (issued May 8, 2017); *A.G.*, Docket No. 18-0329 (issued July 26, 2018).

[21] OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified. *See* Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.808.6(f) (March 2017). *See J.J.*, Docket 18-1615 (issued March 5, 2019).

using the method outlined in *The Guides Newsletter*. Moreover, he advised that the accepted condition of neck sprain was a self-limited diagnosis and it was unclear whether appellant's cervical fusion was authorized. Dr. Katz indicated that the medical record lacked sufficient information to calculate an impairment rating and recommended a second opinion impairment evaluation.

On June 13, 2017 OWCP referred appellant to Dr. Cenac to serve as a second opinion physician. In a July 11, 2017 report, Dr. Cenac reported essentially normal findings on physical examination of the bilateral upper and lower extremities and cervical spine with the exception of slightly diminished sensation in the right index finger. He also reported that cervical spine x-ray studies were normal. Dr. Cenac advised that there were no medical findings to support ongoing medical treatment for the cervical spine following the unauthorized June 7, 2005 fusion. He agreed with Dr. Katz that, the accepted cervical sprain had resolved and advised that the accepted right shoulder tendinitis had also resolved. Dr. Cenac concluded that, appellant had no permanent impairment.

On September 14, 2017 Dr. Katz agreed with Dr. Cenac's opinion that appellant had no bilateral upper extremity permanent impairment. He properly applied the DBI method to Dr. Cenac's findings in concluding that appellant had zero percent bilateral upper extremity permanent impairment. Dr. Katz found that, under Table 15-5 on page 402, a diagnosis of tendinitis was a class zero impairment defined as no significant objective findings at MMI with an assigned default value of zero percent. He determined that this resulted in zero net adjustment. Dr. Katz also properly applied *The Guides Newsletter* to Dr. Cenac's findings in concluding that appellant had no permanent impairment of the upper extremities. He explained that appellant had no motor or sensory impairments pertaining to the cervical spine in accordance with *The Guides Newsletter*. Dr. Katz noted that an impairment rating based on the ROM method could not be calculated because Dr. El-Abassi did not document three ROM measurements as required by the A.M.A., *Guides*[22] or the arc of motion of each shoulder.

As OWCP did not obtain a supplemental report from the attending physician or the second opinion physician containing three independent measurements of each ROM in accordance with the procedures set forth in the A.M.A., *Guides* and FECA Bulletin No. 17-06, the Board will remand the case for OWCP to obtain the evidence necessary to complete the rating as described above.[23] Following this and 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.

[22] A.M.A., *Guides* 464.

[23] *Supra* note 20.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 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: October 4, 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