United States Department of Labor
Employees' Compensation Appeals Board

W.M., Appellant	)	
and	)	**Docket No. 19-1531**
	)	**Issued: February 25, 2020**
U.S. POSTAL SERVICE, SOUTHEASTERN PROCESSING & DISTRIBUTION CENTER, Pittsburgh, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 10, 2019 appellant, through counsel, filed a timely appeal from a January 30, 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 greater than one percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On February 16, 2007 appellant, then a 46-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on February 11, 2007 he injured his left elbow when pulling down trays of mail while in the performance of duty. OWCP accepted the claim for sprain/strain of left elbow, and subsequently OWCP expanded acceptance of the claim to include lesion of the ulnar nerve on the left.

On September 19, 2008 Dr. Michael J. Maggitti, a Board-certified orthopedic surgeon, noted that appellant had failed conservative treatment and an ulnar nerve transposition was warranted. Surgical records confirm that appellant underwent an authorized ulnar nerve transposition procedure with ulnar nerve and flexor release on October 14, 2008 which was performed by Dr. Maggitti. OWCP paid appellant intermittent wage-loss compensation benefits on the supplemental rolls from October 13, 2008 until December 7, 2008.

On December 19, 2017 appellant, through counsel, filed a claim for a schedule award (Form CA-7).

In support of his claim, appellant submitted a December 15, 2016 report by Dr. David Weiss, a Board-certified orthopedic surgeon and osteopath, who noted appellant's history of injury and treatment. Regarding appellant's left elbow, Dr. Weiss reported findings of a well-healed surgical scar over the medial aspect, joint stable to valgus and varus stress tests. He noted that appellant had tenderness over his medial epicondyle, and no tenderness over the cubital tunnel. Tinel's and ulnar nerve compression tests were positive. Regarding range of motion (ROM), Dr. Weiss related that he had obtained 3 measurements of appellant's left elbow and that flexion and extension were 145/145 degrees, pronation was 80/80 degrees, and supination was 80/80 degrees. He referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] and noted that for entrapment neuropathy, left ulnar nerve at elbow, appellant had a grade modifier clinical studies (GMCS) of 1, grade modifier functional history (GMFH) of 1, and a grade modifier physical examination (GMPE) of 2. Dr. Weiss found that, following application of the net adjustment formula, appellant's permanent impairment rating remained at two percent. He also referred to Table 15-4 for a Class 1 left medial epicondylitis with flexor release, and found that appellant had a Class 1 impairment with a GMFH of 1, GMPE of 1, and GSCS of 1 therefore the net adjustment was 0, and appellant's default impairment rating was five percent impairment, after net adjustment.[4] Dr. Weiss concluded that appellant had a combined left upper extremity permanent impairment of

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

[4] *Id*. at 399.

seven percent for his left ulnar nerve entrapment neuropathy and medical epicondylitis, and that appellant had reached maximum medical improvement (MMI) on December 16, 2016.

In a report dated April 8, 2018, Dr. Jovito Estaris, Board-certified in occupational medicine, serving as a district medical adviser (DMA), found that appellant had one percent permanent impairment of the left upper extremity.

The DMA noted that, for medial epicondylitis, Table 15-4,[5] Elbow Regional Grid, Dr. Weiss chose a Class 1 with a default value of 5, which required a surgical release of flexor or extensor tendon, however, the medical records did not include an operative report. He indicated that appellant had surgery for ulnar nerve entrapment which was "completely different from the surgical release of the flexor or extensor tendon." The DMA advised that the correct rating was Class 1, level 1, with a default value of one percent. He also noted that appellant had an injection to the medial epicondyle, but this was not a surgical release.

The DMA referred to Table 15-23,[6] Entrapment/Compression Neuropathy Impairment, and indicated that the diagnostic test findings were most consistent with a GMCS of 1. He also noted that the GMFH was consistent with mild intermittent symptoms involving the left upper extremity for a GMFH of 1, and that examination of the left hand revealed a GMPE of 2. Using the net adjustment formula, the DMA opined that appellant had one percent impairment to the left upper extremity with MMI on December 15, 2016. The DMA also noted that the record contained three sets of ROM measurements; however, under Table 15-33,[7] appellant had zero percent loss of ROM.

By decision dated September 12, 2018, OWCP granted appellant a schedule award for one percent permanent impairment of the left upper extremity. The award ran for 3.12 weeks for the period December 15, 2016 to January 15, 2017.

On November 8, 2018 appellant, through counsel, requested reconsideration. Counsel noted that there was a conflict in the medical opinion evidence between Dr. Weiss and the DMA, and therefore a referral for an impartial medical evaluation was warranted.

By decision dated January 30, 2019, OWCP found that appellant had no more than the previously awarded one percent permanent impairment of the left upper extremity. It explained that Dr. Weiss' report was of diminished probative value due to the errors in his report.

[5] *Id*. at 399.

[6] *Id*. at 449.

[7] *Id*. at 474.

LEGAL PRECEDENT

The schedule award provisions of FECA,[8] and its implementing federal regulations,[9] 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the sixth edition of the A.M.A., *Guides*, published in 2009.[10] 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.[11]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).[12] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted GMFH, GMPE, and GMCS.[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[14] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids, and calculations of modifier scores.[15]

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 diagnosis-based sections are applicable.[16] 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 added.[17] Adjustments for functional history may be made if the evaluator

[8] *Supra* note 2 at 8107.

[9] 20 C.F.R. § 10.404.

[10] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* (2009) is used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[11] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[12] A.M.A., *Guides* (6th ed. 2009), at 3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[13] *Id.* at 494-531.

[14] *Id.* 411.

[15] *See R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[16] A.M.A., *Guides* 461.

[17] *Id.* at 473.

determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.[18]

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)."[19]

FECA Bulletin further advises: "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]

The Bulletin also advises: "If the original impairment rating found by the DMA to be insufficient was provided from a second opinion or referee physician (*versus* the claimant's physician), the CE should request a supplemental/clarification report from the second opinion or referee physician to address the medical evidence necessary to complete the impairment assessment. Medical evidence received in response to this request should then be routed back to the DMA for a final determination. The CE should not render a decision on the schedule award impairment rating until the necessary medical evidence has been obtained."[21]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[22]

ANALYSIS

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

In a December 15, 2016 report, Dr. Weiss, appellant's treating physician, noted appellant's history of injury and treatment, examined appellant, and determined that appellant had five percent permanent impairment to the left upper extremity, based upon the diagnosis of left medial

[18] *Id.* at 474.

[19] *V.L.*, Docket No. 18-0760 (issued November 13, 2018); FECA Bulletin No. 17-06 (May 8, 2018).

[20] *Id.*

[21] *Id.*

[22] *See* Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.808.6(f) (February 2013). *See also J.T.*, Docket No. 17-1465 (issued September 25, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

epicondylitis with flexor release. OWCP's DMA reviewed Dr. Weiss' report on April 8, 2018. Regarding the left medial epicondylitis diagnosis, for which Dr. Weiss assigned five percent permanent impairment, the DMA explained that no operative report was of record, but that appellant did not undergo a left medial epicondylitis with flexor release therefore appellant did not have a five percent permanent impairment due to this diagnosis. The DMA explained that using Table 15-4, appellant's left medial epicondylitis diagnosis placed him in Class 1, with a default value of 1, rather than the default value of 5 that Dr. Weiss had assigned based upon a surgical procedure.

The Board has duly considered the matter and finds that the operative report of October 14, 2008 supports a finding that appellant did undergo a left ulnar nerve transposition with ulnar nerve and flexor release. As the DMA reported that no operative report was of record, after obtaining all necessary medical evidence, the entire medical record should be routed back to the DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*.[23] After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[23] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 25, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
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