United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 19-1511**
	)	**Issued: January 10, 2020**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Denver, CO, 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 July 8, 2019 appellant, through counsel, filed a timely appeal from an April 24, 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 her burden of proof to establish more than two percent permanent impairment of her left upper extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

On April 15, 2014 appellant, then a 34-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left arm injury when lifting a mailbag while in the performance of duty. OWCP assigned the claim File No. xxxxxx943, accepted it for strain of the left forearm and tenosynovitis of the left wrist/hand, and paid her wage-loss compensation benefits on the daily rolls for intermittent disability commencing June 11, 2014.

Appellant had previously filed a claim for a November 17, 2012 traumatic injury which OWCP accepted for left wrist sprain under OWCP File No. xxxxxx204. By decision dated July 31, 2015, OWCP granted her a schedule award under her previous claim for one percent permanent impairment of her left upper extremity. OWCP File Nos. xxxxxx943 and xxxxxx204, have been administratively combined with the latter designated as the master file.

On June 13, 2016 appellant filed a claim for a schedule award (Form CA-7) due to her left upper extremity injuries accepted under the present claim, OWCP File No. xxxxxx943.

In an August 26, 2016 report, Dr. Jack L. Rook, Board-certified in physical medicine and rehabilitation, indicated that he was applying the diagnosis-based impairment (DBI) rating method for appellant's left upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] He noted that the condition of left wrist sprain/strain warranted two percent permanent impairment of the left upper extremity under Table 15-3 on page 395, and that the condition of left elbow sprain/strain warranted two percent permanent impairment under Table 15-4 on page 398. Dr. Rook found that appellant had a functional history grade modifier (GMFH) of 4, a physical examination grade modifier (GMPE) of 2, and a clinical studies grade modifier (GMCS) of 1.

On November 22, 2016 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), and requested that he evaluate her left upper extremity permanent impairment under the sixth edition of the A.M.A., *Guides.* In November 26 and 30, 2016 reports, the DMA determined that Dr. Rook's finding of a GMFH of 4 was unreliable and should be excluded from the schedule award calculation as the value was excessive given the values of the other grade modifiers.[4] He explained that "[i]n the case of the wrist impairment, the GMFH is 3 higher than the GMPE of 1 and in the case of the elbow, the GMFH is 2 higher than the GMPE of 2." Thus, pursuant to page 406 of the A.M.A.,

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

[4] *Id.* at 406-07.

Guides, the GMFH is excluded from the grading process as unreliable. The DMA concluded that appellant therefore sustained two percent permanent impairment of the left upper extremity.

In order to clarify the nature of her permanent impairment, OWCP referred appellant to Dr. John D. Douthit, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he examine her and evaluate her left upper extremity permanent impairment under the sixth edition of the A.M.A., *Guides.*

In a February 27, 2017 report, Dr. Douthit detailed his physical examination findings, noting that appellant had tenderness on the dorsum of her left arm and that she did not have full range of motion (ROM) of her left wrist. He found that her elbows had full ROM on pronation/supination and she had 160 degrees of left elbow flexion, but that she lacked 10 degrees of left elbow extension. Dr. Douthit diagnosed aggravated sprain of the left arm/elbow. He provided a calculation under the DBI rating method and noted that, under Table 15-4, appellant's left elbow sprain/strain fell under a class of diagnosis (CDX) of 1 with a default value of one percent permanent impairment of the left upper extremity. Dr. Douthit indicated that she had a GMFH of 3, GMPE of 2, and GMCS of 0, and noted that application of the net adjustment formula required movement one space to right of the default value on Table 15-4. Therefore, under the DBI rating method, appellant had two percent permanent impairment of her left upper extremity.

By decision dated March 28, 2017, OWCP granted appellant a schedule award for an additional one percent permanent impairment of her left upper extremity, for a total of two percent permanent impairment of her left upper extremity.

On April 11, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch and Hearings and Review. A hearing was held on October 12, 2017.

By decision dated December 22, 2017, an OWCP hearing representative set aside the March 28, 2017 schedule award decision and remanded the case to OWCP for referral of the case record, including Dr. Douthit's February 27, 2017 report, to a DMA for a permanent impairment rating under the sixth edition of the A.M.A., *Guides.*

On March 26, 2018 OWCP referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA. It requested that he provide an opinion as to the extent of her left upper extremity permanent impairment. In a March 29, 2018 report, the DMA indicated that he had reviewed Dr. Douthit's February 27, 2017 report and he determined that appellant had two percent permanent impairment of her left upper extremity under both the DBI and ROM rating methods. With respect to his ROM rating, he noted that, under Table 17-33 on page 474 of the sixth edition of the A.M.A., *Guides*, her two percent permanent impairment was due to loss of extension of the left elbow.

By decision dated October 11, 2018, OWCP determined that appellant had not met her burden of proof to establish more than two percent permanent impairment of her left upper extremity, for which she previously received schedule award compensation. It noted that Dr. Douthit and the most recent DMA, Dr. Harris, had determined she had two percent permanent impairment of her left upper extremity.

On October 19, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. During the hearing held on March 8, 2019, counsel argued that the DMA had not provided medical rationale in support of his permanent impairment calculation based on the ROM rating method.

By decision dated April 24, 2019, OWCP's hearing representative affirmed the October 11, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[5] and its implementing federal regulations,[6] 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8] The sixth edition requires identifying the impairment class for the CDX, which is then adjusted by grade modifiers GMFH, GMPE, and GMCS.[9] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[10]

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).
>
> "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*

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] 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).

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

[10] *Id.* at 521.

rating for the diagnosis in question, the method producing the higher rating should be used." (Emphasis in the original.)

* * *

"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."[11]

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.[12] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[13] 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 cite 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 CE.[14]

The Board finds that this case requires further development of the medical evidence. On March 29, 2018 the DMA indicated that he had reviewed the February 27, 2017 report of

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

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

[13] *K.J.*, Docket No. 19-0901 (issued December 6, 2019); *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[14] *See supra* note 12.

Dr. Douthit, OWCP's referral physician, and determined that appellant had two percent permanent impairment of her left upper extremity as calculated under both the DBI and ROM rating methods. Since Dr. Douthit provided a rating using the DBI rating method and her condition provided for application of the ROM rating method, the DMA was required to independently calculate her impairment using both the DBI and ROM methods and identify the higher rating for the claims examiner.[15]

The Board notes that, although the DMA attempted to conduct a rating calculation under the ROM method, the case record does not contain recent ROM findings for properly conducting a left upper extremity 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. However, such instructions were not fully carried out in this case and therefore it requires further development of the medical evidence in accordance with FECA Bulletin No. 17-06.[16] Dr. Douthit indicated in his February 27, 2017 report, that appellant did not have full ROM of the left wrist and lacked 10 degrees of left elbow extension, but he did not provide specific ROM measurements for her left wrist or elbow. The DMA, who reviewed Dr. Douthit's February 27, 2017 report, merely indicated that she lacked left elbow extension and found two percent permanent impairment based on ROM deficit upon left elbow extension. The DMA did not refer to specific ROM measurements for the left elbow.

Section 15.7 of the sixth edition of the A.M.A., *Guides* provides that ROM should be measured after a "warm up," in which the individual moves the joint through its maximum ROM at least three times. The ROM examination is then performed by recording the active measurements from three separate ROM efforts and all measurements should fall within 10 degrees of the mean of these three measurements. The maximum observed measurement is used to determine the ROM impairment.[17] There currently is no evidence in the case record that these requirements for evaluating permanent impairment due to ROM deficits have been met.

In order to conduct a full evaluation of appellant's left upper extremity permanent impairment, the Board finds that the case shall be remanded to OWCP in order for it to make an attempt to obtain the raw data from Dr. Douthit's ROM testing for the left upper extremity. If the data is obtained, it should be evaluated and considered under the relevant standards of the A.M.A., *Guides*, including referral to a DMA, as a possible basis for an impairment rating. If no such data is obtained, OWCP should take appropriate action for further examination to obtain the necessary range of motion measurements.

This case shall therefore be remanded for full application of OWCP procedures found in FECA Bulletin No. 17-06 and the standards of the sixth edition of the A.M.A., *Guides*. After conducting such further development of the medical evidence, OWCP shall issue a *de novo* decision regarding appellant's permanent impairment.

[15] *Id.*

[16] *See supra* note 12.

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

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: January 10, 2020
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