

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
T.C., Appellant)	
)	
and)	Docket No. 19-0771
)	Issued: March 17, 2021
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE, Fresno, CA,)	
Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 25, 2019 appellant, through counsel, filed a timely appeal from a January 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 greater than five percent permanent impairment of each upper extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

On June 27, 2014 appellant, then a 39-year-old data transcriber, filed an occupational disease claim (Form CA-2) alleging that she sustained swelling of her hands and fingers and numbness extending from her elbows to her fingertips causally related to factors of her federal employment. She noted that she became aware of her condition on February 3, 2014 and attributed it to her federal employment on June 25, 2014. OWCP accepted the claim for bilateral lateral epicondylitis, bilateral sprains of the elbow and forearm, and bilateral tenosynovitis of the hands and wrists. It subsequently expanded the acceptance of appellant's claim to include bilateral carpal tunnel syndrome.

Appellant underwent a left carpal tunnel release on March 11, 2015 and a right carpal tunnel release on July 1, 2015. On January 11, 2016 she resumed her regular employment duties.

On April 13, 2016 appellant filed a schedule award claim (Form CA-7).

In a development letter dated June 3, 2016, OWCP requested that appellant submit an impairment evaluation from her attending physician that addressed whether she had obtained maximum medical improvement (MMI) and provided a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

In a report dated September 7, 2016, Dr. Mesfin Seyoum, who specializes in family medicine, discussed appellant's complaints of pain and swelling in the bilateral elbows, wrists, and hands. He found a *QuickDASH* score of 80. Dr. Seyoum measured normal range of motion (ROM) of the bilateral elbows and decreased ROM of the bilateral wrists. He further found a bilateral positive Tinel's sign and Phalen's test. For the left upper extremity, Dr. Seyoum determined that appellant had 6 percent permanent impairment due to carpal tunnel syndrome and 3 percent permanent impairment due to ulnar neuropathy, 2 percent permanent impairment due to lateral epicondylitis, and 2 percent permanent impairment due to tenosynovitis of the left wrist/hand, for a total of 13 percent permanent impairment of the left upper extremity. For the right upper extremity, he found 6 percent permanent impairment due to carpal tunnel syndrome, 2 percent permanent impairment due to lateral epicondylitis, and 2 percent permanent impairment due to tenosynovitis of the left wrist/hand, for a total right upper extremity impairment of 10 percent.

On November 27, 2016 Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), found that appellant had three percent permanent impairment due to bilateral carpal tunnel syndrome and three percent impairment due to bilateral cubital tunnel

³ A.M.A., *Guides* (6th ed. 2009).

syndrome, which when combined according to the provisions of the A.M.A., *Guides* yielded four percent permanent impairment. He further found one percent permanent impairment due to tenosynovitis of the bilateral hands and wrists and one percent permanent impairment due to bilateral lateral epicondylitis, for a combined permanent impairment rating of six percent for each upper extremity.

By letter dated June 26, 2017, OWCP advised appellant that the evidence submitted was insufficient to support her schedule award claim. It requested that she provide a report from her physician addressing whether she had reached MMI and providing ROM measurements consistent with the A.M.A., *Guides*, noting that three independent ROM measurements must be obtained and the greatest ROM measurement used to determine the extent of impairment. OWCP informed appellant that, if her physician was unwilling or unable to provide such a report, it would refer her for a second opinion examination. It afforded her 30 days to submit the requested information. No response was received.

By decision dated September 6, 2017, OWCP denied appellant's claim for a schedule award.

On September 11, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a supplemental report dated October 18, 2017, Dr. Seyoum opined that appellant had reached MMI on January 11, 2016. He advised that at the time of his September 7, 2016 impairment rating, ROM was "not considered as a method of choice in rating the extremities" and thus he had rated the impairment using the diagnosis-based impairment (DBI) method. Dr. Seyoum related that he would be willing to reevaluate appellant "in order to properly document the values of the ROM and thereafter, submit a report discussing both the ROM and the DBI method."

Following a preliminary review, by decision dated January 3, 2018, OWCP's hearing representative vacated the September 6, 2017 decision and remanded the case for OWCP to refer Dr. Seyoum's October 18, 2017 report to a DMA for review.

On March 11, 2018 Dr. Slutsky, utilizing the DBI method, found that appellant had three percent permanent impairment of each upper extremity due to carpal tunnel syndrome, one percent permanent impairment due to tenosynovitis of the bilateral hands and wrists, and one percent permanent impairment due to lateral epicondylitis of the bilateral elbows. He noted that Dr. Seyoum had not provided an impairment rating for cubital tunnel syndrome. Dr. Slutsky opined that appellant had five percent permanent impairment of each upper extremity.

By decision dated April 25, 2018, OWCP granted appellant a schedule award for five percent permanent impairment of each upper extremity. The period of the award ran for 31.20 weeks from September 7, 2016 to April 13, 2017.

On May 3, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on October 17, 2018. Thereafter, OWCP received a report of March 29, 2018 electrodiagnostic testing showing findings consistent with carpal tunnel syndrome bilaterally.

By decision dated January 2, 2019, OWCP's hearing representative affirmed OWCP's April 25, 2018 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁴ and its implementing federal regulations,⁵ 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 specified edition of the A.M.A., *Guides*, published in 2009.⁶ 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.⁷

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).⁸ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹¹

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.404.

⁶ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

⁹ *Id.* at 494-531.

¹⁰ *Id.* at 411.

¹¹ *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

FECA Bulletin No. 17-06 provides guidance in applying ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities.¹² Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

“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.*” (Emphasis in the original.)¹³

The Bulletin further provides:

“If the medical evidence of record is [in]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.¹⁴

“Upon receipt of such a report, and if the impairment evaluation was provided from the claimant’s physician, the CE should write to the claimant advising of the medical evidence necessary to complete the impairment assessment and provide 30 days for submission. Any evidence received in response should then be routed back to the DMA for a final determination. Should no evidence be received within 30 days of the date of the CE’s letter, the CE should proceed with a referral for a second opinion medical evaluation to obtain the medical evidence necessary to complete the rating. After receipt of the second opinion physicians’ evaluation, the CE should route that report to the DMA for a final determination.”¹⁵

¹² FECA Bulletin No. 17-06 (May 8, 2017).

¹³ *Id.*

¹⁴ *Id.*; *R.L.*, Docket No. 19-1793 (issued August 7, 2020).

¹⁵ *Id.* See also *W.H.*, Docket No. 19-0102 (issued June 21, 2019).

ANALYSIS

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

In an impairment evaluation dated September 7, 2016, Dr. Seyoum rated appellant's permanent impairment of the bilateral upper extremities using the DBI method set forth in the A.M.A., *Guides*. He found that she had 13 percent permanent impairment of the left upper extremity and 10 percent permanent impairment of the right upper extremity.

Dr. Slutsky, a DMA, applied the DBI methodology to Dr. Seyoum's findings and determined that appellant had six percent permanent impairment of each upper extremity.

Subsequently, OWCP requested that appellant submit a report from her physician rating any permanent impairment using both the DBI and ROM method. It advised that the A.M.A., *Guides* required three independent ROM measurements with the greatest of the measurements used to determine the extent of any impairment. OWCP indicated that it would refer appellant for a second opinion examination if her physician could not provide such a report.

On October 18, 2017 Dr. Seyoum asserted that, at the time he had evaluated appellant, ROM was not the preferred method for rating impairments and that he would need to reevaluate her to determine whether she had an impairment due to ROM. Based on Dr. Seyoum's report, on March 11, 2018 the DMA found that appellant had five percent permanent impairment of each upper extremity using the DBI method.

Pursuant to FECA Bulletin No. 17-06, if OWCP advises the claimant of the evidence necessary to evaluate permanent impairment using the ROM method, but does not receive such evidence, it should refer the claimant for a second opinion evaluation to obtain the evidence necessary to complete the rating.¹⁶ OWCP failed to follow the procedures outlined in FECA Bulletin No. 17-06 by referring appellant for a second opinion after Dr. Seyoum advised that he was unable to rate her impairment using the ROM method without another examination.

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁷ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case. While it began to develop the evidence, it failed to complete its obligation to secure a proper evaluation regarding permanent impairment of the upper extremities based upon the ROM methodology.¹⁸ Therefore, OWCP failed to resolve the issue in the case.¹⁹

¹⁶ *Id.*

¹⁷ See *E.W.*, Docket No. 17-0707 (issued September 18, 2017).

¹⁸ *M.A.*, Docket No. 19-1732 (issued September 9, 2020).

¹⁹ See *X.Y.*, Docket No. 19-1290 (issued January 24, 2020); *K.G.*, Docket No. 17-0821 (issued May 9, 2018).

On remand OWCP shall refer appellant for a second opinion examination to obtain the evidence necessary to calculate her upper extremity impairments using both ROM and DBI methods.²⁰ Following this and such other further development as deemed 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 January 2, 2019 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: March 17, 2021
Washington, DC

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

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

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

²⁰ See *R.C.*, Docket No. 19-1385 (issued September 8, 2020).