United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 21-0125**
	)	**Issued: November 10, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Vincentown, NJ, Employer	)	

Appearances:
Michael D. Overman, 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 November 5, 2020 appellant, through counsel, filed a timely appeal from a May 11, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Appellant died after the filing of this appeal. As such, a substitute appellant is required to carry the appeal forward as the Board's jurisdiction was invoked during her lifetime. *See D.V.*, Docket No. 20-1291 (issued September 14, 2021; *N.D.*, Docket No. 14-1757 (issued June 2, 2015); *Albert F. Kimbrell*, 4 ECAB 662, 666 (1952). Accordingly, appellant's daughter, S.S., is recognized by the Board as the substitute appellant for the purposes of carrying the appeal forward.

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On July 11, 2001 appellant, then a 57-year-old rural mail carrier, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome due to factors of her federal employment. She noted that she first became aware of her condition and its relationship to her federal employment on July 11, 2001. Appellant did not initially stop work.

On October 4, 2001 OWCP accepted appellant's claim for right carpal tunnel syndrome. It later expanded the acceptance of the claim to include bilateral carpal tunnel syndrome, bilateral traumatic lower leg arthropathy, and bilateral disorder of the bursa and tendons in the shoulder region. It paid appellant wage-loss compensation on the supplemental rolls effective January 9, 2004, and the periodic rolls effective November 26, 2006.

Appellant underwent an accepted right wrist multiple flexor synovectomy and right carpal tunnel release on July 15, 2008, and right total shoulder arthroplasty with bicep tenodesis on June 3, 2011.

On September 3, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a September 12, 2019 development letter, OWCP noted that appellant had not provided medical evidence of permanent impairment in support of her schedule award claim. It requested a detailed narrative medical report addressing whether her accepted conditions had reached maximum medical improvement (MMI) and whether she had any permanent impairment of a scheduled member in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4]

No impairment rating was provided.

On September 26, 2019 counsel requested that appellant's schedule award claim be "suspended." He related that she had not reached MMI and that medical evidence in support of the schedule award would be submitted at a later date.

[3] 5 U.S.C. § 8101 *et seq*.

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

By decision dated December 5, 2019, OWCP denied appellant's claim for a schedule award, finding that there was no medical evidence to establish that she had reached MMI and had sustained permanent impairment of a scheduled member or function of the body.

On December 16, 2019, appellant through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

A hearing was held telephonically on April 1, 2020.

In a January 13, 2020 report, Dr. Andrew Frederic Kuntz, a Board-certified orthopedic surgeon, noted that appellant had a 10-year history of left shoulder pain, which had been progressively worsening. She had been scheduled twice to have her left shoulder replaced, but had not undergone the procedure. Appellant had undergone a right shoulder replacement four to five years prior, but had fallen a few months prior and sustained a right shoulder periprosthetic fracture. Dr. Kuntz diagnosed primary osteoarthritis of the left shoulder, status post-shoulder replacement on the right, and fracture of right humerus following insertion of orthopedic implant. He provided physical examination findings for the bilateral shoulders. Regarding appellant's left shoulder, Dr. Kuntz related her range of motion (ROM) as 70 degrees forward flexion, -15 external rotation, unable to perform internal rotation, and 90 degrees abduction. He also noted that she had capsular irritability of the left shoulder, and 4/5 strength of the rotator cuff. Regarding appellant's right shoulder, Dr. Kuntz related that she had 110 degrees of forward flexion, 35 degrees of external rotation, external rotation abduction of 70 degrees, and internal rotation abduction of 5 degrees. He opined that appellant's best treatment would be a left shoulder reverse replacement: however, she did not present as an optimal surgical candidate given her multiple comorbidities and declining medical status. Dr. Kuntz recommended that appellant follow up with her primary care physician for pain management as necessary.

By decision dated May 11, 2020, the hearing representative affirmed the December 5, 2019 denial of appellant's schedule award claim, finding that there was no medical evidence from a physician in the case record to establish that she had reached MMI and that provided a permanent impairment rating.[5]

LEGAL PRECEDENT

Section 8107 of FECA[6] and section 10.404 of the implementing federal regulations,[7] provide for payment for permanent impairment of specified members, functions, and organs of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*, has been adopted by

[5] The hearing representative noted that appellant also had an occupational disease claim for a February 16, 2004 injury which was accepted under OWCP File No. xxxxxx972 for aggravation of bilateral rotator cuff syndrome and aggravation of bilateral carpal tunnel syndrome. Appellant's claims have been administratively combined by OWCP.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

the implementing regulations as the appropriate standard for evaluating schedule losses.[8] For decisions issued after May 1, 2009, OWCP uses the sixth edition of the A.M.A., *Guides*.[9]

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.[10] OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates that the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., Guides.[11] Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.[12] If the claimant does not provide an impairment evaluation and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.[13]

ANALYSIS

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

In a January 13, 2020 report, Dr. Kuntz noted appellant's 10-year history of left shoulder pain, which had been progressively worsening. He diagnosed primary osteoarthritis of the left shoulder, status post-shoulder replacement on the right, and fracture of right humerus following insertion of orthopedic implant. Dr. Kuntz provided physical examination findings for the bilateral shoulders, specifically noting ROM measurements for each shoulder. He opined that appellant's best treatment would be a left shoulder reverse replacement; however, she did not present as an optimal surgical candidate given her multiple comorbidities and declining medical status.

OWCP's procedures provide that if a claimant does not provide an impairment evaluation from his or her physician when requested, and there is an indication of permanent impairment in the medical evidence of file, the claims examiner (CE) should refer the claimant for a second opinion evaluation. The CE may also refer the case to the District Medical Adviser (DMA) prior

[8] *See D.J.*, Docket No. 20-0017 (issued August 31, 2021); *F.S.*, Docket No. 18-0383 (issued August 22, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] 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); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[10] *Id*.

[11] *Id*.

[12] *Id*. at Chapter 2.808.6(a) (March 2017).

[13] *Id*. at Chapter 2.808.6(c).

to scheduling a second opinion examination to determine if the evidence in the file is sufficient for the DMA to provide an impairment rating.[14]

The Board finds that while Dr. Kuntz did not provide a rating of appellant's permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*, the evidence of record establishes appellant's diagnoses and that a diagnosis-based permanent impairment rating could be completed under the *Guides*. For example, the evidence of record establishes that appellant underwent right shoulder arthroplasty in 2011. Table 15-5, the shoulder regional grid,[15] provides a rating method for shoulder arthroplasty. Dr. Kuntz also provided evidence regarding appellant's ROM of both upper extremities, which may be used to determine whether appellant had a ratable impairment due to loss of ROM.

On remand OWCP shall refer the case record to the DMA to determine if the evidence in the file is sufficient for the DMA to provide an impairment rating. After such further development of the evidence as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[14] Chapter 2.808.6a(1) provides that the medical evidence should include a detailed history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated. *Supra* note 9 at Chapter 2.808.6a.

[15] *Supra* note 5 at 408.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2020 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 10, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
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Valerie D. Evans-Harrell, Alternate Judge
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