United States Department of Labor
Employees' Compensation Appeals Board

W.G., Appellant	)	
and	)	**Docket No. 21-0295**
	)	**Issued: May 16, 2022**
DEPARTMENT OF VETERANS AFFAIRS, ST. ALBANS HARBOR HEALTHCARE SYSTEM, Jamaica, NY, Employer	)	

Appearances:
Alan Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On December 23, 2020 appellant, through counsel, filed a timely appeal from an August 21, 2020 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 greater than three percent permanent impairment of the left upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On May 12, 2014 appellant, then a 48-year-old recreation assistant, filed a traumatic injury claim (Form CA-1) alleging that on May 8, 2014 she fractured her left wrist when her right knee buckled when she attempted to descend steps on a bus while in the performance of duty. She did not stop work. On May 27, 2014 OWCP accepted appellant's claim for a closed fracture of the distal radius with ulna, left.

The record reflects that on June 4, 2014, Dr. Lewis Lane, a Board-certified orthopedic surgeon, performed an open reduction and internal fixation, left radius to treat appellant's left wrist fracture.

In an August 18, 2015 medical report Dr. Lane reviewed appellant's continued treatment following her June 4, 2014 surgical procedure. He indicated that she experienced numbness as a result of her left wrist fracture, but sensation had since returned. Dr. Lane opined that appellant had reached maximum medical improvement (MMI) and diagnosed a comminuted intra-articular fracture of the left wrist. He calculated a 42.5 percent permanent impairment of her left upper extremity.

In a January 9, 2016 note, Dr. Lane again noted that appellant had reached MMI.

On June 1, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a June 22, 2016 medical report, Dr. Kumar Reddy, a Board-certified orthopedic surgeon, performed an orthopedic examination of appellant's left wrist. He recounted the events of the May 8, 2014 employment incident and the subsequent medical treatment of her left wrist. On evaluation and review of appellant's medical records, Dr. Reddy observed pain in her left wrist and hand, as well as no swelling, no tenderness, no gross deformities of the distal radius, no loss of sensation, and no atrophy. He diagnosed a healed fracture of the left distal radius with the median neuropathy resolved with residuals. Dr. Reddy explained that appellant had reached MMI and, using Table 15.4 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] calculated seven percent impairment of her left wrist based on the diagnosis-based impairment (DBI) method.

In a development letter dated January 5, 2017, OWCP advised appellant of the evidence needed to establish her schedule award claim, including a statement for her attending physician confirming that the relevant conditions had reached MMI, and providing a permanent impairment

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

rating according to the appropriate criteria and tables of the sixth edition of the A.M.A., *Guides*. It afforded her 30 days to submit the necessary evidence.

By decision dated August 17, 2017, OWCP denied appellant's schedule award claim.

On August 28, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a November 29, 2017 medical report, Dr. Reddy reviewed his initial June 22, 2016 medical report and added that this evaluation of appellant's left wrist revealed complaints of pain as well as a normal range of motion (ROM) per the A.M.A., *Guides*. He again observed no swelling or tenderness, no gross deformities, no loss of sensation, and no atrophy. Using the class of diagnosis (CDX) as a class one, with a grade modifier for functional history (GMFH) of one, a grade modifier for physical examination (GMPE) of one, and a grade modifier for clinical studies (GMCS) of one, Dr. Reddy calculated four percent permanent impairment of her left upper extremity.

A telephonic hearing was held on February 13, 2018. Counsel asserted that OWCP should have referred appellant to a district medical adviser (DMA) upon receipt of Dr. Reddy's medical reports.

By decision dated April 27, 2018, OWCP's hearing representative vacated the August 17, 2017 decision and remanded the case for further development of the medical evidence. She ordered that the case record be returned to an OWCP DMA for review and consideration of Dr. Reddy's June 22 and November 29, 2017 medical reports.

On May 10, 2018 OWCP routed the case file, along with a statement of accepted facts (SOAF), to Dr. Jovito Estaris, Board-certified in occupational medicine and serving as an OWCP DMA, for review as to whether appellant sustained permanent impairment of her left upper extremity as a result of her accepted May 8, 2014 employment injury.

In a May 24, 2018 medical report, Dr. Estaris indicated that he reviewed the SOAF and the medical evidence of record, including both Dr. Reddy's June 22, 2016 and November 29, 2017 impairment ratings, but had not physically examined appellant. He diagnosed a comminuted fracture of the distal radius and observed Dr. Reddy's findings of pain in the left wrist and hand, no swelling, tenderness or atrophy, as well as full ROM. Utilizing Dr. Reddy's physical findings and referencing the sixth edition of the A.M.A., *Guides*, Dr. Estaris identified the CDX as a class one default value three fracture according to Table 15-4, page 399. He applied a GMFH of one, a GMPE of zero, and did not use a GMCS, reasoning that an x-ray study was used for the diagnosis and proper placement in the regional grid. Dr. Estaris utilized the net adjustment formula to determine a two percent permanent impairment of appellant's left upper extremity. He further found that the recorded ROM of her wrist was normal and, utilizing the ROM method, found zero percent permanent impairment of the left upper extremity. As the DBI method produced the higher rating, Dr. Estaris determined that the use of the two percent permanent impairment was appropriate. He disagreed with Dr. Reddy's determination, explaining that a GMPE should not have been used because there were no abnormal physical findings, no tenderness, no atrophy and appellant demonstrated full ROM. Dr. Estaris further explained that these findings were

necessary, in accordance with Table 15-8, page 408 of the sixth edition of the A.M.A., *Guides*, in order for appellant's injury to qualify as a grade one GMPE. Since those criteria were not documented in Dr. Reddy's physical examination, the proper GMPE was zero, which resulted in a two percent permanent impairment of the left upper extremity.

In a June 8, 2018 letter, OWCP referred a copy of Dr. Estaris' findings to Dr. Reddy and requested that he respond to Dr. Estaris' findings, with regard to appellant's impairment rating of her left upper extremity. It explained that, if he disagreed with any of Dr. Estaris' conclusions, he should thoroughly discuss his points of disagreement and explain his reasoning thoroughly.

In a July 3, 2018 letter, counsel explained that Dr. Reddy was no longer seeing federal patients and that appellant would need to be reevaluated by another physician. He indicated that she was scheduled to be examined by Dr. Stewart Kaufman, a Board-certified orthopedic surgeon, on August 29, 2018 and requested an extension of time in order for him to respond to OWCP's June 8, 2018 letter. In an attached addendum dated June 18, 2018, Dr. Kaufman performed a records review of the medical findings of Drs. Reddy and Estaris and determined that there was insufficient medical evidence to perform an impairment rating utilizing the ROM method. He opined that appellant would need to be reexamined in order for him to provide input for decision making.

In a subsequent August 29, 2018 medical report, Dr. Kaufman reviewed the history of appellant's May 8, 2014 employment injury and her subsequent medical treatment for her left wrist injury. He indicated that she experienced pain in her left wrist with employment activity. On examination, Dr. Kaufman observed that appellant's left ulnar and radial were diminished compared to her right and she had a weak fist on the left. He diagnosed a comminuted intra-articular fracture of the left distal radius, status postsurgical repair with possible neuropathy. Utilizing Table 15-32, page 473 of the sixth edition of the A.M.A., *Guides*, Dr. Kaufman found the palmar flexion at 50 degrees, the dorsiflexion at 70 degrees, radial deviation at 50 degrees, and ulnar deviation at 60 degrees, calculating a four percent permanent impairment of the left upper extremity using the ROM method. Referencing the sixth edition of the A.M.A., *Guides*, Table 15-3, page 396, he identified the CDX as a class one default value three. Dr. Kaufman applied a GMFH of one, a GMPE of zero, and a GMCS of one and, using the net adjustment formula, he found four percent permanent impairment of the left upper extremity.

On October 30, 2018 OWCP routed the case file, along with a SOAF, to Dr. Estaris for review on the newly submitted medical evidence from Dr. Kaufman. In his December 14, 2018 report, Dr. Estaris reviewed the SOAF and medical evidence of record, explaining that a ROM method was not initially used in his impairment rating analysis because there was only one set of ROM findings and the impairment rating calculated by utilizing the ROM method was not higher than the DBI method. He reasoned that, had the ROM method returned a higher rating, he would have requested that additional measurements of appellant's left wrist to be taken. Dr. Estaris diagnosed a comminuted fracture of the distal radius, left and, referencing the sixth edition of the A.M.A., *Guides*, identified the CDX as a class one default value three fracture according to Table 15-3, page 396. He granted a GMFH of two, a GMPE of zero, and did not use a GMCS, explaining that an x-ray study was used for the diagnosis and proper placement in the DBI grid. Using the net adjustment formula, Dr. Estaris determined that appellant had three percent permanent impairment of her left upper extremity. He explained that the ROM method could not be used

because there were inconsistencies in the measurements of ROM from Drs. Reddy and Kaufman.[4] Dr. Estaris further advised that page 407 of the sixth edition of the A.M.A., *Guides* provides that, if multiple previous ROM evaluations have been documented and there is inconsistency in the rating class between the findings of the two observers, the results are "considered invalid and cannot be used in the impairment rating." He explained that the main discrepancy between his and Dr. Kaufman's determinations was the assignment used for the GMPE. Dr. Estaris reasoned that Dr. Kaufman's findings on physical examination did not show any abnormality that was a part of the criteria for a grade one modifier.[5] He further reasoned that, because the x-ray scan of appellant's wrist was used in diagnosis and proper placement in the DBI grid, a GMCS of two was incorrect.

By decision dated February 25, 2020, OWCP granted a schedule award for three percent permanent impairment for appellant's left upper extremity. The award ran for 9.36 weeks from August 29 to November 2, 2018 and was based on Dr. Estaris' December 14, 2018 report.

On March 5, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on June 11, 2020. Counsel asserted that the DMA did not submit a response with regard to Dr. Kaufman's DBI impairment rating of four percent. He argued that the DMA overstepped his duties by making an adjudicatory decision. Counsel also contended that the DMA erred by not independently calculating the ROM impairment rating and identifying the higher rating. He explained that the DMA should have instead referred appellant to a referee physician to perform another impairment rating or to opine on which physician was accurate.

By decision dated August 21, 2020 an OWCP Hearing representative affirmed OWCP's February 25, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[6] and its implementing federal regulations,[7] 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.

[4] Dr. Estaris observed that Dr. Reddy's ROM measurements of appellant's left wrist found 60 degrees at the dorsiflexion, 60 degrees at the palmar flexion, a 30 degree ulnar deviation and a 20 degree radial deviation. He noted that Dr. Kaufman's measurements found 70 degrees at the dorsiflexion, 50 degrees at the palmar flexion, a 60 degree ulnar deviation and a 50 degree radial deviation.

[5] Dr. Estaris observed that Dr. Kaufman noted a deficit in the ROM in appellant's left wrist, but explained that, due to the discrepancies between Drs. Kaufman and Reddy's ROM calculations, the ROM measurements could not be used.

[6] *Supra* note 2.

[7] 20 C.F.R. § 10.404.

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.[8] 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.[9]

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): A Contemporary Model of Disablement.[10] Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by GMFH, GMPE, and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[13]

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.[14] 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.[15] 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.[16]

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides, in 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).

[8] 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 id*. at Chapter 3.700, Exhibit 1 (January 2010).

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

[10] 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.

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

[12] *Id*. at 411.

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

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

[15] *Id*. at 473.

[16] *Id*. at 474.

> "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.)"[17]

The Bulletin further advises:

> "If the rating physician provided an assessment using the ROM 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."[18]

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.[19]

ANALYSIS

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

In his December 14, 2018 medical report, Dr. Estaris serving as DMA, reviewed a SOAF and the medical evidence of record. Referencing the sixth edition of the A.M.A., *Guides* he utilized the initial findings of Dr. Reddy and subsequent findings of Dr. Kaufman to determine that appellant sustained a three percent permanent impairment of her left upper extremity using the DBI method. Dr. Estaris explained that the ROM method could not be used to calculate disability as there were inconsistencies in the measurements for ROM from Drs. Reddy and Kaufman. He advised that, page 407 of the sixth edition of the A.M.A., *Guides* explained that, if multiple previous ROM evaluations have been documented and there is inconsistency in the rating class between the findings of the two observers, the results are "considered invalid and cannot be used in the impairment rating."

Counsel asserted that the DMA erred as he did not independently calculate the ROM impairment rating nor did he seek to obtain the proper ROM measurements through another impairment rating evaluation when he observed an inconsistency in the measurements used by Drs. Reddy and Kaufman. The Board notes that section 15.3b, page 407, of the A.M.A., *Guides*[20]

[17] FECA Bulletin No. 17-06 (issued May 8, 2017). *See also L.G.*, Docket No. 18-0519 (issued March 8, 2019); *D.F.*, Docket No. 17-1474 (issued January 23, 2018).

[18] *Id*.

[19] *Supra* note 8 at Chapter 2.808.6(f) (March 2017).

[20] A.M.A., *Guides* (6th ed. 2009), at 407, section 15.3b.

explains how an evaluator should apply grade modifiers based on physical examination when determining permanent impairment of the upper extremities utilizing the DBI method. It then refers to section 15.7 for ROM impairment and notes the specific parameters for how to measure ROM for the upper extremity. Section 15.3b further provides: "If multiple previous evaluations have been documented and there is inconsistency in a rating class between the findings of two observers, or in the findings on separate occasions by the same observer, the results are considered invalid and cannot be used to rate impairment."

The Board has found that, in instances in which it is determined that the ROM methodology could not be utilized due to inconsistent findings, OWCP should refer the case for further development.[21] Pursuant to FECA Bulletin No. 17-06,[22] if the medical evidence of record is insufficient 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. In the present case, Dr. Estaris asserted that Drs. Reddy and Kaufman's ROM measurements were inconsistent, and thus could not be used for an impairment rating because they were invalid. He, however, failed to advise as to the medical evidence necessary to complete the rating and instead only submitted an impairment rating based on the DBI method. Consequently, the Board will remand the case to OWCP for further development. On remand, OWCP shall prepare an updated SOAF and obtain a rationalized opinion from a physician in the appropriate field of medicine as to the nature and extent of appellant's permanent impairment. Following this and other 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.

[21] *See C.W.*, Docket No. 19-0407 (issued July 24, 2019).

[22] *V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018); FECA Bulletin No. 17-06 (issued May 8, 2017).

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2020 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: May 16, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board