United States Department of Labor
Employees' Compensation Appeals Board

N.O., Appellant	)	
and	)	**Docket No. 14-1276**
	)	**Issued: February 15, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Portland, ME, Employer	)	

Appearances:
James G. Noucas, Jr., 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
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 12, 2014 appellant, through counsel, filed a timely appeal from an April 4, 2014 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.[3]

[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.*

[3] The Board notes that appellant submitted additional evidence following the April 4, 2014 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt,* 57 ECAB 126 (2005).

ISSUE

The issue is whether appellant has established more than six percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On December 9, 2009 appellant, then a 50-year-old part-time flexible rural carrier, sustained a traumatic injury in the performance of duty when she slipped on snow and fell down while loading her vehicle. OWCP accepted her claim for right shoulder rotator cuff tear, right shoulder supraspinatus tendinitis, and bicipital tendinitis. It paid disability compensation benefits. On April 21, 2010 appellant returned to full-time modified duty.

On March 5, 2012 appellant filed a claim for a schedule award (Form CA-7). She provided a February 29, 2012 impairment rating by Dr. Davis W. Clark, a Board-certified orthopedic surgeon. Dr. Clark referenced the December 9, 2009 employment injury and reviewed appellant's medical history. He related appellant's complaints of limited range of motion about her shoulder with pain at the extremes of motion. Upon examination of the right shoulder, Dr. Clark observed mild tenderness over the rotator cuff, acromioclavicular (AC) joint, and bicipital groove. Hawkin's impingement test was negative. Neer's impingement test was mildly positive. Dr. Clark noted: "After an appropriate warm-up, range of motion testing of the right shoulder was carried with three repetitions." He reported flexion to 80 degrees, extension to 40 degrees, abduction to 100 degrees, adduction to 30 degrees, external rotation (with arm positioned at 90 degrees) to 50 degrees, and internal rotation (with arm position at 90 degrees) to 30 degrees. Dr. Clark diagnosed right shoulder rotator cuff tear with impingement.

Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), Table 15-5, page 405, Dr. Clark reported that: "if motion loss is present, this impairment may alternatively be assessed using section 15.71, range of motion impairment." He noted that the following upper extremity impairments were related to the range of motion examination. Dr. Clark determined that according to Table 15-34, page 475, appellant had a total of 20 percent permanent impairment of the right upper extremity.[4] Utilizing Table 15-35 and Table 15-37, he noted grade modifiers of 2 for range of motion and for appellant's *Quick*DASH score of 57. Because the range of motion and grade modifiers were equal, Dr. Clark found no adjustment of the 20 percent upper extremity rating of permanent impairment. He reported a date of maximum medical improvement (MMI) of November 29, 2011.

On April 5, 2012 Dr. David Krohn, an OWCP medical adviser, reviewed Dr. Clark's evaluation. Using the diagnosis-based impairment (DBI) method of evaluating permanent impairment, he referred to Table 15-5, page 402, of the A.M.A., *Guides* and reported a default impairment of one percent for a diagnosis of partial thickness tear. Dr. Krohn noted grade

[4] Dr. Clark added the values of 9 percent impairment for flexion, 1 percent for extension, 3 percent for abduction, 1 percent for adduction, 2 percent for external rotation, and 4 percent for internal rotation for a total of 20 percent.

modifiers[5] and adjusted the default impairment rating to two percent. He explained that he did not use the range of motion method to determine impairment because there appeared to be substantial deterioration in appellant's right shoulder condition. Dr. Krohn pointed out that appellant had excellent range of motion during a March 1, 2011 examination with Dr. Patrick Casey, a Board-certified orthopedic surgeon, but Dr. Clark's February 29, 2012 examination findings were significantly less. Given this discrepancy, he concluded that he could not determine the extent of her permanent impairment. Dr. Krohn recommended that appellant be referred to a referee physician to evaluate the range of motion of the right and left shoulders.

On October 17, 2012 OWCP found a conflict in medical opinion between Dr. Clark, appellant's physician, and Dr. Krohn, OWCP's referral physician. It referred appellant's case to Dr. Daniel O'Neill, a Board-certified orthopedic surgeon to resolve the conflict of appellant's impairment rating. In a November 13, 2012 report, he reviewed appellant's history and noted her complaints of decreased range of motion in her right shoulder. Upon examination, Dr. O'Neill observed some tenderness to palpation in the left shoulder and uncomfortable biceps tendon and bursa on the right shoulder. He reported decreased range of motion with flexion to 110 degrees on the right, 130 degrees on the left, abduction to 160 degrees bilaterally, and external rotation to 30 degrees bilaterally. Dr. O'Neill noted that he was unable to evaluate her range of motion or her strength at 90 degrees of horizontal abduction because appellant became uncomfortable. He further reported that it was difficult to determine the range of motion of appellant's left upper extremity due to injury, but he felt that his calculations were accurate and reproducible.

Referring to page 385 of the sixth edition of the A.M.A., *Guides*, Dr. O'Neill noted that most impairment values for the upper extremity were calculated using the DBI method. He noted that the range of motion method was used primarily as a physical examination adjustment factor and only used to determine actual impairment value when it was not possible to otherwise define impairment. Utilizing the shoulder regional grid, Table 15-5, Dr. O'Neill determined that appellant had class 1 impairment for full-thickness tear. He found that appellant had a grade modifier of 2 for functional history and physical examination and none for clinical studies. Relying on the net adjustment formula, page 411, Dr. O'Neill concluded that appellant had six percent upper extremity permanent impairment. He reported a date of MMI of March 1, 2011.

On February 7, 2013 Dr. Morley Slutsky, an OWCP medical adviser, reviewed appellant's medical records, including Dr. O'Neill's November 13, 2012 evaluation. He noted the examination date of November 13, 2012 as the date of MMI. Dr. Slutsky opined that the DBI method was the preferred rating method for the upper extremities and that the range of motion method should be a physical adjustment factor. He further opined that an impairment rating based only on range of motion should be used when no other approach, such as the DBI method, was available. Using the DBI method of evaluating impairment, Dr. Slutsky identified a diagnosis of full-thickness tear with residual loss of function, which resulted in a class 1 default rating. He reported grade modifiers of 2 for clinical studies and 1 for functional history and physical examination. Dr. Slutsky pointed out that Dr. O'Neill documented one motion per joint

[5] Dr. Krohn reported a grade modifier of -1 for Functional History (GMFH) for "no problem." He noted a grade modifier of +1 for Physical Examination (GMPE) due to appellant's "history of trauma." Dr. Krohn reported a grade modifier of +3 for Clinical Studies (GMCS) for more than one of the following symptomatic diagnoses.

movement, but this was "not consistent with the validity criteria in section 15.7, page 464 … for measuring [range of motion]." Accordingly, he concluded that Dr. O'Neill's range of motion measurements were invalid for impairment calculations. Utilizing the net adjustment formula, Dr. Slutsky opined that appellant had six percent permanent impairment of the right upper extremity.

In a decision dated April 18, 2013, OWCP issued a schedule award for six percent permanent impairment of appellant's right upper extremity.

On May 14, 2013 counsel requested a review of the written record. In a statement, he contended that OWCP's physicians failed to properly apply the A.M.A., *Guides* because they rejected range of motion method. Counsel pointed out that section 15.2, page 387, allowed for the use of the range of motion method when a grid permitted its use. He noted that Shoulder Regional Grid, Table 15-5, specifically allowed that: "If motion loss is present, this impairment may alternatively be assessed using section 15.7, Range of Motion Impairment." Counsel also noted that according to the "Fundamental Principles of the [A.M.A.], *Guides*," if more than one method may be used to rate a particular impairment, the method producing the higher rating must be used." Thus, he concluded that appellant should be granted an impairment rating of 20 percent as Dr. Clark properly applied the A.M.A., *Guides* and produced the higher impairment rating. Counsel included copies of the various medical reports and sections of the A.M.A., *Guides.*

By decision dated July 29, 2013, an OWCP hearing representative affirmed the April 18, 2013 schedule award decision. He found that OWCP incorrectly determined that a conflict in medical opinion existed regarding the percentage of impairment, and therefore, Dr. O'Neill's report should only be considered a second opinion evaluation and not be accorded the special weight of a referee opinion. The hearing representative further determined that because Dr. Clark did not explain why he did not use the DBI method and failed to provide findings of appellant's left upper extremity range of motion to compare with his right, his report lacked probative value.

On October 7, 2013 OWCP received appellant's request for reconsideration. Counsel noted that an enclosed report from Dr. Clark responded to OWCP's hearing representative's issues regarding his report. He alleged that Dr. Clark's evaluation was the only evaluation of appellant's permanent impairment rating that complied with the A.M.A., *Guides.*

In a September 5, 2013 report, Dr. Clark noted that he used the range of motion method as opposed to the DBI for impairment rating because both the "Fundamental Principles of the A.M.A., *Guides*" and the "Clarifications and Corrections" Supplement to the A.M.A., *Guides* allowed for that method to be used. He also explained that he did not compare the right shoulder to the left because appellant's left shoulder was previously injured and would not be part of a valid examination.

In a decision dated April 4, 2014, OWCP denied modification of the July 29, 2013 hearing representative's decision. It found that Dr. Slutsky's report provided adequate reasoning to explain that the DBI method of evaluation was preferable and that his finding of six percent permanent impairment properly conformed to the A.M.A., *Guides.*

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of the Office of Workers' Compensation Programs.[6] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[7] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[8]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*" The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[9] 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.[10]

ANALYSIS

The issue on appeal is whether appellant has established more than six percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

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

The Board has found that OWCP has 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 has been followed regarding the proper use of the DBI or the range of motion methodology when assessing the extent of permanent impairment for schedule award

[6] *See* 20 C.F.R. §§ 1.1-1.4.

[7] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[8] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[10] *Isidoro Rivera*, 12 ECAB 348 (1961).

purposes.[11] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[12] In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and range of motion methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either range of motion or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.[13]

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside April 4, 2014 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

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

[12] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[13] *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.[14]

Issued: February 15, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

[14] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.