United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket No. 15-1164**
	)	**Issued: February 24, 2017**
U.S. POSTAL SERVICE, MAIN POST ANNEX, Indianapolis, IN, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 28, 2015 appellant, through counsel, filed a timely appeal from a December 12, 2014 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.

ISSUE

The issue is whether appellant has more than 14 percent permanent impairment of the right upper extremity.

[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.*

FACTUAL HISTORY -- xxxxxx185

On September 30, 2008 appellant, then a 25-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on September 7, 2008 she sprained her right shoulder in the performance of duty. OWCP accepted the claim, assigned OWCP File No. xxxxxx185, for muscle strain and impingement syndrome of the right shoulder.

On August 7, 2009 appellant underwent a subacromial decompression and bursectomy of the right shoulder. She returned to work with restrictions on September 16, 2009 and to her regular employment on December 4, 2009.

On February 5, 2010 a nurse practitioner provided range of motion (ROM) measurements for appellant's right shoulder. An OWCP medical adviser, in a report dated June 16, 2010, applied Table 15-34 on page 475 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) to the measurements and found, after applying grade modifiers, that appellant had eight percent permanent impairment of the right upper extremity.

By decision dated November 18, 2010, OWCP granted a schedule award for eight percent permanent impairment of the right upper extremity. The period of the award ran for 24.96 weeks from February 5 to July 29, 2010.

On April 8, 2013 appellant requested an increased schedule award (Form CA-7).

In an impairment evaluation dated March 1, 2013, Dr. Martin Fritzhand, a Board-certified urologist, who specializes in occupational medicine, discussed appellant's history of her September 2008 shoulder injury. He found right shoulder clavicular tenderness, reduced muscle strength, and right upper extremity atrophy. Dr. Fritzhand advised that appellant had reached maximum medical improvement in August 2010. Using the diagnosis-based impairment (DBI) method, he diagnosed a partial thickness tear of the rotator cuff using Table 15-5 on page 402 of the A.M.A., *Guides*, which yielded a default value of one percent. Dr. Fritzhand found, however, that the impairment could also be assessed using the ROM method under Table 15-34 on page 475. He measured ROM for the right shoulder of 110 degrees forward flexion, 20 degrees extension, 100 degrees abduction, 30 degrees adduction, 90 degrees external rotation, and 20 degrees internal rotation. Dr. Fritzhand further found 4/5 muscle strength of the shoulder and reduced right biceps circumference. He noted that appellant had a *Quick*DASH (Disabilities of the Arm, Shoulder, and Hand) score of 61.4. Dr. Fritzhand determined that she had 3 percent impairment in flexion, 2 percent impairment in extension, 3 percent impairment in abduction, 1 percent impairment in adduction, 4 percent impairment in internal rotation, and no impairment in external rotation, which he added to find 13 percent right upper extremity impairment.[3]

An OWCP medical adviser reviewed Dr. Fritzhand's impairment evaluation on May 23, 2013. He concurred with his finding that appellant had 13 percent permanent right upper extremity impairment using the ROM method. The medical adviser adjusted the

[3] A.M.A., *Guides* 475, Table 15-34.

impairment rating upward by a net modifier of 1 based on appellant's *Quick*DASH score of 61.4, to find 14 percent permanent impairment of the right upper extremity.

In a decision dated October 1, 2013, OWCP granted appellant a schedule award for an additional six percent impairment of the right upper extremity. The period of the award ran for 18.72 weeks from March 1 to July 10, 2013.

FACTUAL HISTORY -- xxxxxx785

On September 8, 2011 appellant, then a 28-year-old mail handler, filed a traumatic injury claim alleging that on August 28, 2011 she sprained her right wrist moving a box. OWCP accepted her claim, assigned OWCP File No. xxxxxx785, for right wrist sprain, right hand sprain, a contusion of the right middle finger, and a closed fracture of the distal end of the radius of the right hand.

On January 9, 2012 appellant filed a claim for a schedule award (Form CA-7). By letter dated January 11, 2012, OWCP requested that Dr. Kevin Julian, an attending Board-certified orthopedic surgeon, provide an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides.* On March 7, 2012 Dr. Julian advised that appellant had two percent permanent impairment of the upper extremity due to a wrist fracture under Table 15-3 on page 396 of the A.M.A., *Guides*.

By decision dated September 20, 2012, OWCP denied appellant's claim for a schedule award. It determined that she had not provided an impairment evaluation in support of her claim.

On September 24, 2012 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In an impairment evaluation dated March 1, 2013, Dr. Fritzhand found tenderness of the right radial wrist on palpation. He measured ROM of the right wrist as 30 degrees flexion, 40 degrees extension, 20 degrees ulnar deviation, and 0 degrees radial deviation. Dr. Fritzhand further found 4/5 muscle strength of the palmar flexors of the right wrist with full sensation and no atrophy. He advised that appellant had reached maximum medical improvement in August 2012 and indicated that she had a *Quick*DASH score of 61.4. Using the DBI method, Dr. Fritzhand identified the diagnosis as wrist sprain under Table 15-3 on page 396, and noted that the A.M.A., *Guides* provided that the impairment could alternatively be assessed using the ROM method. He determined that, under the ROM method and according to Table 15-32 on page 473 of the A.M.A., *Guides*, appellant had 3 percent impairment due to loss of flexion, 3 percent impairment due to loss of extension, 4 percent impairment due to reduced radial deviation, and 2 percent impairment for loss of ulnar deviation, for a total right upper extremity permanent impairment of 12 percent.

In a decision dated May 22, 2013, an OWCP hearing representative set aside the September 20, 2012 decision. She remanded the case for OWCP to refer Dr. Fritzhand's March 1, 2013 impairment evaluation to a medical adviser for review.

On July 9, 2013 an OWCP medical adviser determined that appellant had three percent permanent impairment of the right upper extremity. He related that his rating differed from

Dr. Fritzhand's because he used the more preferred DBI method. The medical adviser identified the diagnosis as a class 1 right wrist fracture, which yielded a default impairment of three percent. He applied grade modifiers of one for physical examination findings based on appellant's tenderness to palpation, zero for clinical studies as they were used to identify the diagnosis, and zero for functional history as the *Quick*DASH score of 70 exceeded the findings on physical examination and was therefore unreliable. Applying the net adjustment formula yielded three percent right upper extremity permanent impairment.

By decision dated July 11, 2013, OWCP denied appellant's claim for an increased schedule award. It noted that she had already received a schedule award for eight percent permanent impairment of the right upper extremity under OWCP File No. xxxxxx185, and thus concluded that the evidence did not show that she was entitled to a greater award.

On July 15, 2013 appellant, through counsel, requested a telephone hearing.

Following a preliminary review of the record, in a decision dated November 21, 2013, an OWCP hearing representative vacated the July 11, 2013 decision. He noted that Dr. Fritzhand had provided two March 1, 2013 impairment evaluations, one relevant to the injury in the current OWCP file number and one relevant to OWCP File No. xxxxxx185. The hearing representative instructed OWCP, on remand, to combine the two file numbers, prepare an updated statement of accepted facts, and request that a medical adviser review both reports from Dr. Fritzhand and provide a total impairment rating of the upper extremities.

On December 20, 2013 an OWCP medical adviser found that appellant had a total right upper extremity impairment of six percent, using the DBI method. For the right shoulder, he identified the diagnosis as class 1 tendinitis with residual loss, which yielded a default value of 3 using Table 15-5 on page 402, the Shoulder Regional Grid. The medical adviser determined that the ROM measurements for the right shoulder obtained by Dr. Fritzhand were not valid as prior ROM measurements for the right shoulder were better than those found by Dr. Fritzhand. He therefore applied a grade modifier of one for physical examination. The medical adviser determined that grade modifiers for functional history and clinical studies were not applicable. He found no net adjustment from the default value of three percent.

For the right wrist, the medical adviser again found that Dr. Fritzhand's ROM findings were invalid as the measurements were considerably worse than other earlier ROM measurements of the right wrist of record and as he had measured only one motion per joint. He identified the diagnosis as a right wrist fracture. The medical adviser applied a grade modifier of one for physical examination. He determined that any grade modifier for functional history would be unreliable as the *Quick*DASH score of 70 percent equaled a grade modifier of 3, which exceeded the physical examination grade modifier of 1 by 2 or more places and thus was unreliable under the A.M.A., *Guides* at page 406. The medical adviser found that a grade modifier for clinical studies was not applicable as it was used to place the diagnosis into the class. He found no adjustment from the three percent default value. The medical adviser combined the three percent right wrist impairment with the three percent right shoulder impairment to find a total six percent right upper extremity permanent impairment.

By decision dated March 21, 2014, OWCP denied appellant's claim for an increased schedule award.

On March 26, 2014 appellant, through counsel, requested a telephone hearing. At the hearing, held on October 1, 2014, counsel contended that the A.M.A., *Guides* allowed the most favorable impairment rating and that consequently she should get an award for the impairment under the ROM method.

In a decision dated December 12, 2014, an OWCP hearing representative affirmed the March 21, 2014 decision. She determined that the opinion of the medical adviser constituted the weight of the evidence and established that appellant was not entitled to an increased schedule award.

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 OWCP.[4] 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.[5] 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.[6]

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).[7] 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.[8]

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[4] *See* 20 C.F.R. §§ 1.1-1.4.

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

[6] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] 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).

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

ANALYSIS

The issue on appeal is whether appellant has more than 14 percent permanent impairment of the right upper extremity.

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 ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[9] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[10] 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 ROM 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 ROM 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.[11]

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 the December 12, 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.

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

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

[11] *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: February 24, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board