United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 15-1348**
	)	**Issued: March 17, 2017**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Chicago, IL, Employer	)	

Appearances:
Steven W. Etzler, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 2, 2015 appellant, through counsel, filed a timely appeal from a December 11, 2014 merit decision of the Office of Workers' Compensation Programs. 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 established more than four percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

[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.*

On appeal counsel argues that the range of motion based impairment rating for appellant's left upper extremity should be used to calculate appellant's percentage of permanent impairment.

FACTUAL HISTORY

On September 20, 2005 appellant, then a 51-year-old transportation security screener, filed an occupational disease claim (Form CA-2) alleging that she had developed swelling of her left elbow and left shoulder pain due to working in baggage screening. OWCP accepted her claim for left lateral epicondylitis of the elbow region of a left calcifying tendinitis of the shoulder on November 10, 2005.

On May 10, 2010 Dr. Aaron Anderson, a Board-certified orthopedic surgeon, offered a two percent whole person permanent impairment rating.

In a letter dated May 20, 2010, Dr. Bharat Pithadia, Board-certified in orthopedic medicine, opined that appellant had not reached maximum medical improvement (MMI), however, he was unable to provide an impairment rating at that time.

On July 6, 2010 Dr. Pithadia noted that appellant had visited Dr. Anderson, who had attempted to calculate an impairment rating for appellant, though Dr. Pithadia noted that, at the time of writing, this report was lost. He noted that it was his opinion "from what [he was] being told that [appellant] has reached MMI." Dr. Pithadia noted that he would defer the impairment rating to Dr. Anderson's expertise.

On February 28, 2013 appellant filed a claim for a schedule award (Form CA-7). With her request, she submitted a June 27, 2011 report from Dr. Michael J. Spence, Board-certified in physical medicine and rehabilitation. On examination of the shoulders Dr. Spence noted an active range of motion of the left shoulder of 90 degrees with forward flexion, 90 degrees with abduction, 45 degrees with external rotation, and 60 degrees with internal rotation. Appellant's right shoulder active range of motion was recorded as 100 degrees with forward flexion, 105 degrees with abduction, 60 degrees with external rotation, and 70 degrees with internal rotation. Both shoulders tested positive for impingement and tenderness at the acromioclavicular joint. On examination of the elbows, Dr. Spence noted an active range of motion of the left elbow from 0 to 80 degrees. The active range of motion of appellant's right elbow was from 0 to 100 degrees. Both elbows' range of motion was limited secondary to pain and tenderness at the common extensor origin.

In the same June 27, 2011 report, Dr. Spence opined that appellant had reached MMI on May 10, 2010, at the time of her assessment by Dr. Anderson. He calculated that appellant had 12 percent left upper extremity impairment (UEI) using the range of motion method to arrive at his result. Dr. Spence noted:

> "[Appellant] is found to have a mild range of motion deficit with right forward flexion with [range of motion] limited to 90 degrees with three percent UEI, mild range of motion deficit with right shoulder abduction of 90 degrees with three percent UEI, mild range of motion deficit with right shoulder adduction limited to 25 degrees with one percent UEI. Mild range of motion limitation with right

shoulder external rotation limited to 45 degrees with 2 UEI. These values are added […] = 12 percent UEI overall."

Regarding her left elbow pain, Dr. Spence reported, "Per Table 15-33 on page 474, elbow flexion limited to 80 degrees or eight percent [upper extremity impairment] UEI, full elbow extension or zero percent UEI, full elbow pronation or zero percent UEI, and full elbow supination or zero percent UEI, resulting in eight percent upper extremity for her left elbow." He rendered a whole person impairment rating for appellant's bilateral shoulder range of motion deficit, bilateral elbow range of motion deficits, and her bilateral carpal tunnel syndrome.

OWCP forwarded the case record and a statement of accepted facts (SOAF) to an office medical adviser (OMA) on March 14, 2013. The OMA arrived at a rating of three percent for the left elbow utilizing Dr. Spence's June 27, 2011 report, but he mistakenly based his calculation on the measurements for the right elbow. On June 28, 2013 OWCP again forwarded the case record and a SOAF to the district medical adviser (DMA) for calculation of appellant's percentage of impairment based upon Dr. Spence's June 27, 2011 report, along with the prior OMA's report.

On June 29, 2013 Dr. Morley Slutsky, Board-certified in occupational medicine, responded to OWCP's inquiries. He opined that appellant had reached MMI on June 27, 2011, which was the date of the evaluation by Dr. Spence. Dr. Slutsky calculated appellant's final left upper extremity impairment as four percent, the sum of three percent impairment for the left shoulder and one percent impairment of the left elbow. He omitted the inclusion of percentages of impairment for nonaccepted injuries that were included in Dr. Spence's June 27, 2011 report. Dr. Slutsky noted that the diagnosis-based impairment (DBI) rating methodology was preferred under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, and assigned left elbow lateral epicondylitis and left shoulder partial thickness rotator cuff tear with residual dysfunction as the most impairing diagnoses in the elbow and shoulder regions, respectively. In calculating the impairment rating for the left shoulder, he noted a grade modifier for functional history of 1, as there was no documented functional modification for self-care activities. The grade modifier for the left shoulder for physical examination was also 1, as there was tenderness to palpation and positive impingement testing, but did not include range of motion measurements as Dr. Spence documented only one motion per joint movement. There was no grade modifier for clinical studies as they were used to place appellant into the correct diagnosis. In calculating the impairment rating for the left elbow, Dr. Slutsky noted a grade modifier for physical examination of 1, noting tenderness to palpation, but he did not assign any other grade modifiers. He explained that functional history modifiers may be used only for the largest impairment in the extremity, which in this case was the shoulder, and that diagnostic studies were used to place appellant into the correct diagnosis.

By decision dated April 7, 2014, OWCP granted appellant a schedule award for four percent permanent impairment of her left upper extremity. It noted that the weight of medical evidence regarding appellant's percentage of impairment was assigned to Dr. Slutsky because he correctly applied the A.M.A., *Guides* to Dr. Spence's examination findings.

Appellant requested reconsideration of OWCP's April 7, 2014 decision on September 17, 2014. With her request, she attached a letter from Dr. Spence dated June 2, 2014.

Dr. Spence noted that he had reviewed Dr. Slutsky's report. He reported that Dr. Slutsky had claimed the following:

> "The A.M.A., *Guides* Sixth Edition indicates that the DBI method is the preferred rating method for the upper extremities and that range of motion impairment method should be as a physical adjustment factor. He also indicated that loss of motion may be used as an alternative to the DBI ratings only when there are no DBI ratings available and when the DBI are available, the range of motion measurements may be used as an adjustment factor for physical exam[ination]. As you know, [appellant] has accepted diagnoses of lateral epicondylitis of her left elbow and calcifying tendinitis of her left shoulder per the DMA review. A physical exam[ination] that I performed on June 27, 2011 demonstrated a significantly diminished range of motion in appellant's left shoulder. In order to use the DBI method as described by Dr. Slutsky, the claimant's findings would have to be consistent with class 1 with history of painful injury or occupational exposure, residual symptoms with residual loss, functional with normal motion. Because appellant has significantly diminished range of motion in her left shoulder, the range of motion impairment method not the DBI method is the preferred methodology to calculate permanent partial impairments for left shoulder tendinitis with diminished range of motion. Furthermore, my physical exam[ination] demonstrated that appellant had significantly diminished range of motion in her left elbow because her left elbow flexion is significantly diminished, class 1 with residual loss of strength, functional with normal motion is not applicable requiring the use of the range of motion impairment method. Therefore, I do not agree with the opinion of Dr. Slutsky and recommend using the range of motion impairment method."

OWCP forwarded Dr. Spence's letter to Dr. Slutsky on November 5, 2014, asking him to comment on whether it caused him to alter his prior impairment rating and on whether he agreed with Dr. Spence's assertion that range of motion was the proper method for calculating appellant's percentage of impairment.

On November 5, 2014 Dr. Slutsky replied, stating:

> "I rated [appellant] using the preferred DBI method whereas Dr. Spence used the less range of motion method with invalid range of motion measurements (per the A.M.A., *Guides* 6th ed., please see the rating calculations below). It is important to note that the claimant was found to have pain out of proportion to the objective findings by a physician who evaluated her several times (see comment by Dr. Anderson, shoulder specialist dated [August 6, 2010]). Therefore [appellant's] [range of motion] measurements may be inaccurate as it is controlled by pain (what the claimant is willing to do) *versus* anatomically pathology making the measurements inaccurate. For these reasons [range of motion] for the shoulder and elbow are not used for final impairment calculations."

He further noted that Dr. Spence had only performed one active range of motion measurement per joint motion, when the A.M.A., *Guides* required three measurements, rendering his results

invalid. Dr. Slutsky then reiterated his original DBI calculations for appellant's percentage of impairment, arriving at a sum total of four percent permanent upper extremity impairment.

By decision dated December 11, 2014, OWCP reviewed the merits of appellant's claim and denied modification of its prior decision. It found that she had not submitted sufficient medical evidence to establish that the range of motion method was preferable in calculating her final impairment rating, and that Dr. Slutsky's report supported the appropriateness of the use of the DBI method.

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.[3] 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.[4] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[5]

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).[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]

[3] *See* 20 C.F.R. §§ 1.1-1.4.

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

[5] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[6] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

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

ANALYSIS

The issue on appeal is whether appellant has established more than four percent permanent impairment of her left 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 purposes.[8] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[9] 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 DMA 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.[10]

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 such 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 11, 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 that this case is not in posture for decision.

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

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

[10] *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the December 11, 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: March 17, 2017
Washington, DC

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

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

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