United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 17-1348**
	)	**Issued: October 23, 2017**
U.S. POSTAL SERVICE, POST OFFICE, New Brunswick, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 6, 2017 appellant, through counsel, filed a timely appeal from a February 13, 2017 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 more than seven percent permanent impairment of her left upper extremity, for which she previously received schedule awards.

FACTUAL HISTORY

On September 19, 2008 appellant, then a 52-year-old throwback clerk, filed an occupational disease claim (Form CA-2) for a left arm/shoulder condition that she attributed to her repetitive employment duties, which included throwing parcels with her left arm. She described her condition as left shoulder impingement syndrome. Appellant first became aware of her claimed condition on August 21, 2008, and first realized it was related to her federal employment on August 26, 2008. She continued to work after filing her left upper extremity occupational disease claim.[3] On December 18, 2008 OWCP accepted appellant's claim for left shoulder impingement syndrome.

On November 25, 2009 appellant filed a claim for a schedule award (Form CA-7).

Appellant submitted a September 22, 2009 report from Dr. Arthur Becan, an attending Board-certified orthopedic surgeon, who discussed her factual and medical history and reported findings of the physical examination he conducted on that date. Dr. Becan evaluated the permanent impairment of appellant's left upper extremity under the range of motion (ROM) rating method found at Table 15-34 on page 475 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).[4] He found that appellant had 20 percent permanent impairment of her left upper extremity due to limited left shoulder motion, which was comprised of three percent impairment due to 90 degrees of flexion, three percent impairment due to 90 degrees of abduction, six percent impairment due to 45 degrees of internal rotation, and eight percent impairment due to 20 degrees of external rotation. Dr. Becan determined that, under Table 15-35 and Table 15-36 on page 477, appellant's functional history grade modifier of 4 meant that the 20 percent value for her left upper extremity permanent impairment would be increased by 10 percent to 22 percent. Therefore, appellant had a total permanent impairment of her left upper extremity of 22 percent. Dr. Becan indicated that appellant reached maximum medical improvement (MMI) on September 22, 2009.

OWCP referred appellant's case to Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, for review of Dr. Becan's September 22, 2009 report and an opinion on her left upper extremity permanent impairment.

[3] Under a separate claim (OWCP File No. xxxxxx572), OWCP previously accepted that appellant sustained work-related right upper extremity conditions, including right carpal tunnel syndrome. Appellant claimed a schedule award for right upper extremity permanent impairment under that claim, but this matter is not the subject of the present claim. She stopped work for periods in 2009 due to her right upper extremity condition and retired from the employing establishment effective October 4, 2010.

[4] Dr. Becan also provided an impairment rating for permanent impairment of appellant's right upper extremity, but, as previously noted, this matter is not currently before the Board.

In an August 18, 2010 report, Dr. Magliato discussed the contents of Dr. Becan's September 22, 2009 report, noting that Dr. Becan assigned a functional history grade modifier of 4 based on left shoulder motion which was much more limited than that observed by another physician in 2008. He opined that the accepted condition of left impingement syndrome would not have caused such a marked loss of left shoulder motion as found by Dr. Becan. Dr. Magliato suggested that appellant be referred to a second opinion physician or impartial medical specialist for further evaluation.

In September 2011 OWCP referred appellant and the case record for a second opinion examination by Dr. David Rubinfeld, a Board-certified orthopedic surgeon. It requested that Dr. Rubinfeld provide an opinion on the permanent impairment of appellant's left upper extremity.

In a report dated October 10, 2011, Dr. Rubinfeld discussed appellant's factual and medical history and reported the findings of his physical examination of appellant on October 6, 2011. He provided ROM findings for appellant's left shoulder, elbow, wrist, and fingers and indicated that her left upper extremity condition reached MMI as of October 6, 2011. Dr. Rubinfeld found that, based on Table 15-5, Table 15-6, and Table 15-8 of the sixth edition of the A.M.A., *Guides*, appellant had 15 percent permanent impairment of her left upper extremity. He noted that Table 15-8 placed moderately restricted shoulder motion under upper extremity permanent impairment values ranging between 12 and 23 percent.

In a July 26, 2013 report, Dr. Becan discussed the method through which he obtained ROM findings for appellant's left shoulder during the physical examination he conducted on September 22, 2009. He opined that appellant developed a secondary adhesive capsulitis in her left shoulder, which explained the limited motion of her left shoulder.

OWCP referred appellant's case to Dr. Andrew A. Merola, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. It requested that he review Dr. Rubinfeld's October 10, 2011 report and Dr. Becan's July 26, 2013 report, and provide an opinion on appellant's left upper extremity permanent impairment.

On November 23, 2013 Dr. Merola discussed the contents of Dr. Rubinfeld's October 10, 2011 report and Dr. Becan's July 26, 2013 report and recommended that Dr. Rubinfeld provide more detailed calculations of the permanent impairment of appellant's left upper extremity under the standards of the sixth edition of the A.M.A., *Guides.*

OWCP requested a supplemental report from Dr. Rubinfeld and, in a February 26, 2014 report, he determined that appellant had five percent permanent impairment of her left upper extremity under the sixth edition of the A.M.A., *Guides.* Dr. Rubinfeld applied the diagnosis-based impairment (DBI) rating method under Table 15-2 (Shoulder Regional Grid) on page 402. He indicated that appellant's left shoulder impingement fell under class 1 on Table 15-2 with a default value of three percent permanent impairment of the left upper extremity. Dr. Rubinfeld determined that appellant had a functional history grade modifier of 2 and a physical examination grade modifier of 2, and found that a clinical studies grade modifier was not applicable due to the lack of available studies. Application of the net adjustment formula

required movement two spaces to the right of the default value on Table 15-2 such that appellant had total permanent impairment of her left upper extremity of five percent.

OWCP requested that Dr. Merola, in his capacity as OWCP medical adviser, review Dr. Rubinfeld's February 26, 2014 report and provide an opinion on the permanent impairment of appellant's left upper extremity. In an April 24, 2014 report, Dr. Merola indicated that he agreed with Dr. Rubinfeld's calculations and he also found that appellant had five percent permanent impairment of her left upper extremity under the standards of the sixth edition of the A.M.A., *Guides.*

In a September 5, 2014 decision, OWCP granted appellant a schedule award for five percent permanent impairment of her left upper extremity. The award ran for 15.6 weeks from October 4, 2010 to January 21, 2011 and was based on the February 26, 2014 report of Dr. Rubinfeld and the April 24, 2014 report of Dr. Merola.

Appellant, through counsel, requested a video hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on February 26, 2015, counsel argued that Dr. Rubinfeld and Dr. Merola did not adequately explain their conclusions regarding the permanent impairment of appellant's left upper extremity.

In a June 5, 2015 decision, OWCP's hearing representative set aside OWCP's September 5, 2014 decision and remanded the case to OWCP for further development with regard to appellant's left upper extremity permanent impairment. She noted deficiencies in the opinion of Dr. Rubinfeld, including his failure to address whether left adhesive capsulitis should be considered a work-related condition and his failure to adequately consider application of the ROM impairment rating method. The hearing representative remanded the case to OWCP for referral to a new second opinion referral physician and any other development deemed necessary, to be followed by issuance of a *de novo* decision regarding the permanent impairment of appellant's left upper extremity.

On remand OWCP referred appellant to Dr. Donald Heitman, a Board-certified orthopedic surgeon, for a second opinion medical examination and opinion on the nature of her left adhesive capsulitis and the extent of her left upper extremity permanent impairment.

In an August 20, 2015 report, Dr. Heitman discussed appellant's factual and medical history and detailed the findings of the physical examination he carried out on that date, including the findings of ROM testing for the left shoulder.[5] He noted that appellant's chief complaint was left shoulder pain and posited that her left adhesive capsulitis was caused by disuse of her left shoulder due to the work-related left impingement syndrome. Dr. Heitman noted that, under Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides,* appellant had a seven percent permanent impairment of her left upper extremity due to restricted left shoulder motion which was comprised of three percent impairment due to 120 degrees of flexion and four percent impairment due to 25 degrees of external rotation.

[5] Dr. Heitman indicated that appellant had 120 degrees of passive flexion, 25 degrees of active external rotation, and 95 degrees of active abduction (forward elevation).

On November 9, 2015 OWCP requested that Dr. Heitman produce a supplemental report providing a date of MMI and discussing whether the impairment ratings of Dr. Becan and Dr. Rubinfeld were devised in accordance with the standards of the sixth edition of the A.M.A., *Guides.* It also requested that Dr. Heitman clarify whether appellant's left adhesive capsulitis was work related and whether it contributed to the permanent impairment of her left upper extremity.

In a November 16, 2015 report, Dr. Heitman indicated that appellant's left shoulder condition had reached MMI, but that it was unknown precisely when the condition reached MMI. He provided a different assessment of left upper extremity permanent impairment than he did on August 20, 2015, noting that, under Table 15-34 of the sixth edition of the A.M.A., *Guides,* appellant had five percent permanent impairment of her left upper extremity due to restricted left shoulder motion which was comprised of three percent impairment due to 95 degrees of abduction and two percent impairment due to 25 degrees of external rotation. Dr. Heitman posited that appellant's left adhesive capsulitis was work related and that it contributed to the permanent impairment of her left upper extremity. He indicated that the impairment calculations of Dr. Becan appeared to be correct given the ROM findings he obtained. Dr. Heitman noted that Dr. Rubinfeld mentioned Table 15-5, Table 15-6, and Table 15-8 of the sixth edition of the A.M.A., *Guides*, but indicated that he did not provide specific calculations under those tables.

On December 17, 2015 OWCP expanded the accepted conditions to include left shoulder adhesive capsulitis.

OWCP referred appellant's case to Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. It requested that he review Dr. Heitman's reports and provide an opinion on appellant's left upper extremity permanent impairment.[6]

In a December 27, 2015 report, Dr. Garelick indicated that it was unclear whether appellant had received any schedule award compensation due to permanent impairment of her left upper extremity. He noted that Dr. Heitman properly determined that appellant had seven percent permanent impairment of her left upper extremity due to restricted left shoulder motion.[7] Dr. Garelick indicated that the A.M.A., *Guides* preferred the DBI rating method to the ROM rating method, but posited that use of the ROM rating method was appropriate in appellant's case given the fact that the A.M.A., *Guides* did not provide a method for rating adhesive capsulitis under the DBI rating method. He advised that appellant's left shoulder condition reached MMI as of October 6, 2011.

OWCP again referred the case to Dr. Garelick in his role as OWCP medical adviser. It advised him about appellant's prior schedule award for left upper extremity impairment and

[6] OWCP also referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, in his capacity as an OWCP medical adviser. Dr. Harris produced a December 18, 2015 report, but it was later determined that the case was referred to him in error and his report was discounted.

[7] Dr. Garelick did not address the fact that Dr. Heitman found five percent permanent impairment in his November 16, 2015 report.

requested that he provide a supplemental report. In a February 5, 2016 report, Dr. Garelick noted that, at the time of his December 27, 2015 report, he was not aware that appellant had already received a schedule award for five percent permanent impairment of her left upper extremity. He advised that appellant was entitled to compensation for seven percent permanent impairment of her left upper extremity based on application of the ROM rating method under the sixth edition of the A.M.A., *Guides*. Therefore, appellant was due a schedule award for an additional two percent permanent impairment of her left upper extremity. Dr. Garelick advised that the date of MMI remained October 6, 2011.

In a July 28, 2016 decision, OWCP granted appellant a schedule award for an additional two percent permanent impairment of her left upper extremity. The award ran for 6.24 weeks from January 22 to March 6, 2011 and was based on the reports of Dr. Heitman and Dr. Garelick. Appellant had now been compensated for a total permanent impairment of her left upper extremity of seven percent.

Appellant, through counsel, requested a video hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on November 29, 2016, counsel argued that Dr. Heitman's impairment rating was not conducted in accordance with the standards of the sixth edition of the A.M.A., *Guides.*

In a February 13, 2017 decision, OWCP's hearing representative affirmed OWCP's July 28, 2016 decision. She determined that appellant had not met her burden of proof to establish more than seven percent permanent impairment of her left upper extremity, for which she previously received schedule awards. The hearing representative found that OWCP properly based its schedule award determination on the reports of Dr. Heitman and Dr. Garelick.

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.[8] 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.[9] 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.[10]

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,

[8] *See* 20 C.F.R. §§ 1.1-1.4.

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

[10] 20 C.F.R. § 10.404; *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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).[11] 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.[12]

ANALYSIS

The issue on appeal is whether appellant has met her burden of proof to establish more than seven percent permanent impairment of her left upper extremity, for which she previously received schedule awards. 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 had been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[13] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[14] In *T.H.*, the Board concluded that OWCP physicians were 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 observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[15]

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the February 13, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly,

[11] *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).

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

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

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

[15] *Supra* note 13.

and after such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for a left upper extremity schedule award.[16]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: October 23, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[16] *See* FECA Bulletin No. 17-06 (issued May 8, 2017).