

**United States Department of Labor
Employees' Compensation Appeals Board**

A.N., Appellant)	
)	
and)	Docket No. 18-0143
)	Issued: July 19, 2018
DEPARTMENT OF AGRICULTURE, FOOD & SAFETY INSPECTION SERVICE, Fresno, CA,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 October 25, 2017 appellant, through counsel, filed a timely appeal from an August 22, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the 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 met his burden of proof to establish more than 11 percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

On appeal, counsel argues that OWCP improperly combined two separate body parts when denying his claim for an increased schedule award.

FACTUAL HISTORY

On November 16, 2007 appellant, then a 49-year-old consumer safety inspector, filed a traumatic injury claim (Form CA-1) alleging that on that date, he pulled or tore a muscle in his left inner arm elbow joint when adjusting a mirror while in the performance of duty. Under File No. xxxxxx289 OWCP accepted his claim for left distal bicep rupture and enthesopathy of elbow region. Appellant underwent a reconstruction with an achilles tendon allograft on April 2, 2008. OWCP paid him wage-loss compensation from March 9 through September 27, 2008 on the supplemental rolls.

Appellant also filed a traumatic injury claim (Form CA-1) on February 22, 2010 in OWCP File No. xxxxxx024 for an injury to his left thumb and hand. That case was accepted by OWCP for rupture of flexor tendons on left hand and wrist, sprain of the left hand, and basal joint arthritis of the left thumb.

On June 14, 2013 OWCP issued appellant a schedule award for 11 percent impairment of his left upper extremity, based upon his left thumb impairment. The award ran for 34.32 weeks.

In a letter dated July 26, 2016, counsel requested a schedule award, and forwarded a June 8, 2016 report by Dr. Michael E. Hebrard, a Board-certified physiatrist. Dr. Hebrard listed appellant's diagnoses as left biceps tendon rupture and enthesopathy of the left elbow region. He opined that appellant reached maximum medical improvement (MMI) on June 8, 2016. Dr. Hebrard further opined that appellant had seven percent permanent impairment of his left upper extremity for the rupture of the left bicep tendon with residual deficits. He explained that pursuant, to the Elbow Regional Grid found in Table 15-4 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ appellant's left bicep tendon rupture was a class 1 impairment. Dr. Hebrard found grade modifiers for physical examination as 3 (based on three centimeters of atrophy on the left with pain), and a functional history modifier 3 (for pain with less than normal activity). He found that this yielded a net adjustment of plus two, which gave appellant a class 1, grade E impairment, which equaled seven percent permanent impairment of the left upper extremity for rupture of the left bicep tendons with residual function deficits.

On September 22, 2016 OWCP referred appellant's file to OWCP's medical adviser. In a report dated October 3, 2016, the medical adviser listed appellant's diagnosis as status post repair of ruptured distal bicep tendon, 2007. The medical adviser found that appellant had seven percent

³ A.M.A., *Guides* (6th ed. 2009).

permanent impairment of the left upper extremity resulting from the employment injury of November 16, 2007. However, as appellant had already received a prior schedule award for 11 percent permanent impairment of the left upper extremity, the medical adviser determined that there had been no increase in his left upper extremity permanent impairment.

By decision dated November 17, 2016, OWCP denied appellant's request for a schedule award as it determined that the evidence of record was insufficient to establish additional permanent impairment of his left upper extremity beyond that which was previously awarded.

By letter dated November 23, 2016, appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. During the hearing, held on June 8, 2017, counsel noted that the prior award for 11 percent permanent impairment of the left upper extremity did not involve the elbow. He contended that there was no logical reason why the previous award would preclude appellant from obtaining an award for an injury to his bicep, and that he deserved an additional schedule award for seven percent permanent impairment of his left upper extremity.

By decision dated August 22, 2017, OWCP's hearing representative affirmed the November 17, 2016 decision. The hearing representative stated that, pursuant to OWCP procedures, the prior rating due to a work-related impairment is subtracted from the total percentage of impairment.

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.

⁴ See 20 C.F.R. §§ 1.1-1.4.

⁵ For a complete loss 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).

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

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different part of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹⁰

ANALYSIS

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

The issue is whether appellant has met his burden of proof to establish more than 11 percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

The Board has found that OWCP had 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 diagnosis-based impairment (DBI) or range of motion (ROM) methodologies when assessing the extent of permanent impairment for schedule award 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 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

⁷ 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 2.808.5(a) (March 2017).

⁸ *Isidoro Rivera*, 12 ECAB 348 (1961); see also *C.H.*, Docket No. 17-1439 (issued February 15, 2018).

⁹ A.M.A., *Guides* 383-492.

¹⁰ 20 C.F.R. § 10.404(d); see *T.S.*, Docket No. 16-1406 (issued August 9, 2017); *T.S.*, Docket No. 09-1308 (issued December 22, 2009).

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

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

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.¹³

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 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly¹⁴ and after 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.

Furthermore, although OWCP informed its medical adviser of appellant's prior award, the medical adviser did not provide an opinion explaining how the current permanent impairment duplicated the prior impairment to the left upper extremity and its relationship to the prior schedule award.¹⁵ Rather, the medical adviser simply noted that appellant previously received a schedule award for 11 percent loss of use of the left upper extremity and that the 7 percent impairment found by Dr. Hebrard was less than the 11 percent previously awarded. The Board notes that the prior award for 11 percent permanent impairment was based on his left thumb impairment, whereas the current claim for a schedule award is based on left distal bicep rupture.

Accordingly, the case will be remanded to OWCP to properly resolve the issue presented. After such further development as deemed necessary, it shall issue a *de novo* decision on all aspects of appellant's schedule award claim.

CONCLUSION

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

¹³ *Supra* note 11.

¹⁴ See FECA Bulletin No. 17-0006 (issued May 8, 2017).

¹⁵ See *J.S.*, Docket No. 15-1252 (issued January 19, 2016) (simply comparing the prior percentage of impairment awarded to the current impairment for the same member is not sufficient); *J.K.*, Docket No. 16-1361 (issued April 18, 2017) (medical evidence must clearly explain how the current permanent impairment duplicated the prior impairment).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 22, 2017 is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: July 19, 2018
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