United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
	)	**Docket No. 17-1608**
and	)	**Issued: June 5, 2018**
	)	
U.S. POSTAL SERVICE, BUSTLETON POST OFFICE, Philadelphia, PA, 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:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 19, 2017 appellant, through counsel, filed a timely appeal from a March 22, 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 the claim.

[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 established greater than four percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY

OWCP accepted that on September 8, 2016 appellant, then a 52-year-old vending clerk, lifted a heavy box of coins, causing adhesive capsulitis of the right shoulder.

Appellant was first followed by Dr. Michael Hicks, a physician Board-certified in emergency medicine. On September 11, 20016 Dr. Hicks diagnosed right biceps tendinitis at the shoulder and right carpal tunnel syndrome. He held appellant off work.[3]

Dr. Walter W. Dearolf, III, an attending Board-certified orthopedic surgeon, diagnosed right shoulder impingement syndrome with a possible rotator cuff tear on September 12, 2006. He administered a subacromial injection. On September 19, 2006 Dr. Dearolf released appellant to light duty as of September 20, 2006. He submitted periodic progress notes.[4]

Appellant accepted a limited-duty position on September 27, 2006. As of November 6, 2006, she was performing her date-of-injury position for six hours a day. OWCP paid wage-loss compensation for the remaining hours. Appellant subsequently resumed full duty.

On September 28, 2016 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, she submitted a May 17, 2016 report from Dr. Nicholas Diamond, an osteopath Board-certified in pain management. Dr. Diamond related appellant's history of injury and treatment and found that appellant had attained maximum medical improvement (MMI). He noted appellant's symptoms of right shoulder pain with "cracking," exacerbated by weather changes. Dr. Diamond obtained a *Quick*DASH questionnaire score of 45. On examination of the right shoulder, he noted acromioclavicular tenderness, anterior and posterior cuff tenderness, bicipital groove tenderness, positive O'Brien's, bicipital load, and Speed tests, and a positive Yergason sign. Dr. Diamond observed the following ranges of motion, each the greatest of three trials: 105 degrees forward elevation; 100 degrees abduction; 70 degrees cross over adduction; full external rotation at 90 degrees; 60 degrees internal rotation; posterior reach to L4 with pain. He also observed 4/5 weakness of the supraspinatus, biceps, triceps, and deltoids, and a normal sensory examination. Dr. Diamond diagnosed right shoulder impingement syndrome, a partial thickness rotator cuff tear, adhesive capsulitis, and post-traumatic bilateral shoulder contusions.

[3] September 11, 2006 x-rays of the right shoulder demonstrated mineralization of the right supraspinatus tendon including the insertion. A September 14, 2006 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated impingement with fraying of the distal supraspinatus tendon and a small subdeltoid effusion or bursitis.

[4] A physical therapist provided work restrictions on September 20, 2006. Appellant participated in physical therapy from September 2006 to January 2007, and in December 2009.

Referring to Table 15-5[5] of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*),[6] Dr. Diamond assessed a grade 1 Class of Diagnosis (CDX) rating of the right shoulder for a partial rotator cuff tear with residual functional loss. He found a grade 3 modifier for Functional History (GMFH) due to a *Quick*DASH score of 77, a grade 1 modifier for Physical Examination (GMPE), and a grade modifier for Clinical Studies (GMCS) of 2. Applying the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (3-1) + (1-1) + (2-1), or 2 + 0 + 1, Dr. Diamond calculated a net adjustment of 3, raising the default grade of C upward to E, resulting in five percent permanent impairment of the right upper extremity.

On October 5, 2016 an OWCP medical adviser reviewed the medical record and a statement of accepted facts (SOAF). He concurred with Dr. Diamond that appellant attained MMI as of May 17, 2016. The medical adviser concurred with the CDX and grade modifiers as found by Dr. Diamond. However, he explained that that GMFH should have been excluded as it exceeded the GMPE by 2, demonstrating that it was unreliable. Applying the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (3-1) + (1-1) + (2-1), excluding the GMFH, resulted in a net modifier of 1. This raised the default grade of C to D, equaling four percent permanent impairment of the right upper extremity.

In an October 11, 2016 letter, OWCP notified appellant of the additional evidence needed to establish her claim, explaining that OWCP's medical adviser disagreed with Dr. Diamond's inclusion of the GMFH in the net adjustment formula. It requested that appellant provide an updated report from Dr. Diamond, addressing the medical adviser's concerns. Appellant was afforded 30 days to submit such evidence. She did not provide additional medical evidence prior to OWCP's next merit decision dated December 9, 2016.

By decision dated December 9, 2016, OWCP issued a schedule award for four percent permanent impairment of the right upper extremity. The period of the award, 12.48 weeks, ran from May 17 to August 12, 2016.

In a December 22, 2016 letter, appellant, through counsel, requested reconsideration. She submitted a December 9, 2016 supplemental report from Dr. Diamond, contending that OWCP's medical adviser misapplied the A.M.A., *Guides*. Dr. Diamond noted that according to section 15.3a, page 406 of the A.M.A., *Guides*, titled "Adjustment Grid: Functional History," if the GMFH differed by 2 or more grades from that described by physical examination or clinical studies, the functional history should be assumed to be unreliable. If the functional history is determined to be unreliable or inconsistent with other documentation, it is excluded from the grading process. As appellant's GMCS was 2, the grade 3 GMFH did "not differ by 2 or more from the" GMCS and should therefore be included in the net adjustment formula. Dr. Diamond reiterated that appellant had five percent permanent impairment of the right upper extremity.

[5] Table 15-5, page 401-405 of the sixth edition of the A.M.A., *Guides* is titled "Shoulder Region Grid: Upper Extremity Impairments."

[6] A.M.A., *Guides* (6th ed. 2009).

On January 21, 2017 OWCP obtained a supplemental report from OWCP's medical adviser, who reviewed Dr. Diamond's December 9, 2016 report. The medical adviser explained that according to section 15.3a, a GMFH two or more grades higher than the GMCS or GMPE should be excluded. Dr. Diamond found a GMFH of 3, exceeding the GMPE of 1 by two grades, although it did not exceed the GMCS of 2 by two or more grades. Therefore, the medical adviser opined that GMFH must be excluded.

By decision dated March 22, 2017, OWCP denied modification of the December 9, 2016 schedule award, finding that Dr. Diamond improperly calculated the percentage of impairment as he included a GMFH two grades higher than the GMPE.

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.[7] 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.[8] 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.[9]

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).[10] 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.[11]

[7] *See* 20 C.F.R. §§ 1.1-1.4.

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

[9] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[10] *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).

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

ANALYSIS

The issue on appeal is whether appellant has established greater than four 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 had been followed regarding the proper use of the diagnosis-based impairment (DBI) or the range of motion (ROM) methodology when assessing the extent of permanent impairment for schedule award purposes.[12] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[13] 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 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 have been 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.[14]

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 March 22, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities applied uniformly,[15] and after such other development as may be deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's claim for an upper extremity schedule award.

CONCLUSION

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

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

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

[14] *Supra* note12.

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 22, 2017 is set aside and the case is remanded.

Issued: June 5, 2018
Washington, DC

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

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

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