

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

L.J., Appellant	)	
	)	
and	)	Docket No. 19-0046
	)	Issued: April 17, 2019
U.S. POSTAL SERVICE, POST OFFICE,	)	
Oregon, OH, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 8, 2018 appellant, through counsel, filed a timely appeal from an August 8, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish greater than one percent permanent impairment of her right upper extremity, for which she previously received schedule award compensation.

## FACTUAL HISTORY

On September 26, 2012 appellant, then a 56-year-old modified window clerk, filed a traumatic injury claim (Form CA-1) alleging that, on August 2, 2012, she sustained an exacerbation of right epicondylitis while in the performance of duty. OWCP accepted the claim, assigned OWCP File No. xxxxxx235, for an aggravation of right lateral epicondylitis.<sup>3</sup> Appellant stopped work on August 9, 2012 and did not return. OWCP paid her wage-loss compensation on the supplemental rolls beginning September 24, 2012, and on the periodic rolls beginning March 10, 2013. Appellant retired from the employing establishment and elected to receive OPM retirement benefits in lieu of workers' compensation benefits, effective August 24, 2014.<sup>4</sup>

On November 24, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated November 30, 2015, OWCP requested that appellant submit an impairment evaluation from her attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>5</sup> addressing the extent of her permanent impairment. It afforded her 30 days to submit the necessary evidence. No response was received.

By decision dated January 20, 2016, OWCP denied appellant's claim for a schedule award. It found that she had not submitted evidence demonstrating permanent impairment of a scheduled member or function of the body.

On January 25, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

In a report dated June 21, 2016, based on an April 15, 2016 evaluation, Dr. Catherine Watkins Campbell, Board-certified in occupational and family medicine, discussed appellant's history of employment-related bilateral lateral epicondylitis. On examination, she found a *QuickDASH* score of 58. Dr. Watkins Campbell measured range of motion (ROM) of the right

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<sup>3</sup> Appellant had a prior claim for a December 9, 2002 employment injury. That claim, assigned OWCP File No. xxxxxx111, was accepted for right lateral epicondylitis. Appellant also had an August 14, 2003 occupational disease claim. That claim, assigned OWCP File No. xxxxxx230, was accepted for left lateral epicondylitis. OWCP has administratively combined OWCP File Nos. xxxxxx111, xxxxxx230, and xxxxxx235, with OWCP File No. xxxxxx111 serving as the master file. which had previously been accepted for right lateral epicondylitis due to a December 9, 2002 employment injury)

<sup>4</sup> By decision dated November 20, 2014, OWCP reduced appellant's wage-loss compensation, effective November 20, 2014, based on its finding that she had the capacity to earn wages as a receptionist. By decision dated July 10, 2015, an OWCP hearing representative affirmed the November 18, 2014 decision.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

upper extremity as negative 8, negative 9, and negative 10 degrees extension; 145, 150, and 150 degrees of flexion; 78, 72, and 72 degrees of supination; and 98, 96, and 94 degrees of pronation. She found grade 4/5 strength in the right upper extremity, grip strength of 28 pounds on the right and 54 pounds on the left, a bilateral intention tremor, and variable tenderness of the right epicondyle. Dr. Watkins Campbell identified the diagnosis as lateral epicondylitis using the elbow regional grid set forth in Table 15-4 on page 399 of the A.M.A., *Guides*, which yielded a default impairment of one percent. She applied a grade modifier of two for functional history (GMFH) based on appellant's *QuickDASH* score, a grade modifier of one for physical examination (GMPE) findings of tenderness with palpation without observed abnormalities, and found that a grade modifier for clinical studies (GMCS) was not applicable. Dr. Watkins Campbell used the net adjustment formula,  $(GMFH-CDX) + (GMPE-CDX)$ , or  $(2-1) + (1-1) = 1$ , to find a net adjustment of one and a right upper extremity impairment of two percent.

By decision dated July 28, 2016, OWCP's hearing representative found that the case was not in posture for a hearing. He set aside the January 20, 2016 decision and remanded the case for OWCP to consider the impairment evaluation from Dr. Watkins Campbell.

On August 31, 2016 Dr. Jovito Estaris, Board-certified in occupational medicine serving as an OWCP district medical adviser (DMA), reviewed the impairment evaluation from Dr. Watkins Campbell. Referencing Table 15-4, the elbow regional grid, he identified the diagnosis as class 1 lateral epicondylitis, which yielded a default value of one percent. Dr. Estaris applied GMFH of two and GMPE of one. He opined that a GMCS was not applicable. Dr. Estaris found that the net adjustment formula  $(GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX)$ , or  $(2-1) + (1-1) + (0-1) = 0$ , yielded a net adjustment of zero. He opined that appellant had one percent permanent impairment of the right upper extremity.

By decision dated November 21, 2016, OWCP granted appellant a schedule award for one percent permanent impairment of the right upper extremity. The period of the award ran for 3.12 weeks from April 15 to May 6, 2016.

Appellant, through counsel, subsequently requested a telephonic hearing before an OWCP hearing representative.

During the telephonic hearing, held on June 14, 2017, counsel maintained that Dr. Watkins Campbell had properly calculated the permanent impairment rating.

By decision dated August 28, 2017, OWCP's hearing representative vacated the November 21, 2016 decision. She found that both Dr. Watkins Campbell and Dr. Estaris used the diagnosis-based impairment (DBI) method without explaining whether the ROM method for evaluating permanent impairment of the upper extremity would have yielded a higher impairment rating. The hearing representative remanded the case for the DMA to determine the extent of appellant's permanent impairment based on ROM measurements of the right upper extremity in accordance with FECA Bulletin No. 17-06.<sup>6</sup>

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<sup>6</sup> FECA Bulletin No. 17-06 (May 8, 2017).

On December 5, 2017 Dr. Estaris applied the provisions of the A.M.A., *Guides* to the right elbow ROM measurements found by Dr. Watkins Campbell. He found that 150 degrees flexion, 8 degree extension, 80 degrees supination, and 100 degrees of pronation yielded no impairment according to Table 15-33 on page 474 of the A.M.A., *Guides*. Dr. Estaris again found one percent right upper extremity permanent impairment using the DBI method.

By decision dated December 6, 2017, OWCP found that appellant had no more than the previously awarded one percent permanent impairment of the right upper extremity.

Appellant, through counsel, again requested a telephonic hearing before an OWCP hearing representative.

During the telephonic hearing, held on May 31, 2018, counsel questioned why the DMA had failed to find Dr. Watkins Campbell's report sufficient to establish two percent permanent impairment of the right upper extremity.

By decision dated August 8, 2018, OWCP's hearing representative affirmed the December 6, 2017 decision.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>7</sup> and its implementing federal regulations,<sup>8</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>9</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>10</sup>

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the elbow, reference is made to Table 15-4 (Elbow Regional Grid) beginning on page 398. After the class of diagnosis (CDX) is determined from the Elbow Regional Grid (including identification of a default grade value), the impairment class is then adjusted by grade modifiers including GMFH, GMPE, and GMCS.<sup>11</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Id.* at § 10.404(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>11</sup> A.M.A., *Guides* 494-531.

FECA Bulletin No. 17-06 provides guidance in applying ROM or DBI methodologies in rating permanent impairment of the upper extremities.<sup>12</sup> Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

“As the [A.M.A.,] *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).

“Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. If the [A.M.A.,] *Guides* allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.” (Emphasis in the original.)<sup>13</sup>

### ANALYSIS

The Board finds that appellant has met her burden of proof to establish two percent permanent impairment of the right upper extremity.

In support of her claim for a schedule award appellant submitted a June 21, 2016 impairment evaluation from Dr. Watkins Campbell. In the report Dr. Watkins Campbell measured ROM of the right upper extremity as negative 8, negative 9, and negative 10 degrees extension; 145, 150, and 150 degrees of flexion; 78, 72, and 72 degrees of supination; and 98, 96, and 94 degrees of pronation. She found strength of 4/5 on the right, grip strength of 28 pounds on the right, and variably right epicondyle tenderness. Dr. Watkins Campbell, using Table 15-4 on page 399 of the A.M.A., *Guides*, identified the CDX of 1 for lateral epicondylitis, which yielded a default one percent impairment. She found a GMFH of two due to appellant’s *QuickDASH* score of 58, a GMPE of one for physical findings of tenderness to palpation, and determined that a GMCS was inapplicable. Dr. Watkins Campbell used the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) or (2-1) + (1-1) = 1, to find a net adjustment of one and a total of two percent right upper extremity impairment.

Dr. Estaris, a DMA, properly found that an alternative impairment rating for loss of ROM could not be used in this case as Dr. Watkins Campbell had measured normal ROM of the right elbow.<sup>14</sup> He concurred with her finding of a CDX of 1 for epicondylitis, which yielded one percent impairment under Table 15-4, the elbow regional grid. Dr. Estaris further concurred with

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<sup>12</sup> *Supra* note 4.

<sup>13</sup> *Id.*

<sup>14</sup> *See generally* C.M., Docket No. 17-1732 (issued August 3, 2018).

Dr. Watkins Campbell's finding of a GMFH of two and GMPE of one for examination findings, and that a GMCS was inapplicable. When applying the net adjustment formula, however, he did not omit the GMCS, as instructed by the A.M.A., *Guides*. Instead, Dr. Estaris found that applying the net adjustment formula (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or  $(2-1) + (1-1) + (0-1) = 0$ , yielded a net adjustment of zero. He opined that appellant therefore had one percent permanent impairment of the right upper extremity. As Dr. Estaris found that clinical studies were inapplicable, however, he should not have included clinical studies as part of the net adjustment formula.<sup>15</sup> Consequently, the formula should be (GMFH-CDX) + (GMPE-CDX), or  $(2-1) + (1-1) = 1$ , for a net adjustment of 1 and thus 2 percent permanent impairment.

The Board finds that appellant has met her burden of proof to establish that she sustained two percent permanent impairment based on the opinion of Dr. Watkins Campbell, who properly applied the provisions of the A.M.A., *Guides* to her findings on examination. There is no current medical evidence of record conforming to the A.M.A., *Guides* which supports a greater impairment.<sup>16</sup>

Appellant may request a schedule award or an increased schedule award at any time based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that appellant has met her burden of proof to establish two percent permanent impairment of her right upper extremity.

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<sup>15</sup> See generally A.M.A., *Guides* 411, which provides, "If a grade modifier is found to be unreliable or inconsistent, it should be disregarded and eliminated from the calculation." See also A.M.A., *Guides* 414, Example 15-3; *L.W.*, Docket No. 14-0503 (issued June 20, 2014).

<sup>16</sup> See *S.H.*, Docket No. 18-1297 (issued January 3, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 8, 2018 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: April 17, 2019  
Washington, DC

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

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

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