United States Department of Labor
Employees' Compensation Appeals Board

W.H., Appellant **and** **DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, Fort Dix, NJ, Employer**	)	**Docket No. 19-0102** **Issued: June 21, 2019**

Appearances:
Alan J. Shapiro, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 17, 2018 appellant, through counsel, filed a timely appeal from an August 22, 2018 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 his burden of proof to establish more than five percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On December 21, 2014 appellant, then a 36-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his right shoulder, right knee, and lower back, when he slipped and fell down four or five stairs while in the performance of duty. He stopped work and returned to modified duty on February 3, 2015.

OWCP accepted the claim for sprain of right elbow and forearm, contusion of right elbow, and enthesopathy of right elbow. Appellant underwent right elbow surgery on August 17, 2015 and again on December 14, 2015. He received wage-loss compensation on the supplemental rolls commencing May 8, 2015 and returned to modified duty on March 6, 2016.

On June 10, 2016 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 22, 2016 report, Dr. Askin noted that appellant had full range of motion (ROM) of his shoulder. He advised that he paid careful attention to the right elbow and found no obvious laxity, and no crepitus, and that, even though appellant reported discomfort with supination, he was able to demonstrate full supination of his forearm. Dr. Askin indicated that appellant continued to have a physical basis for soreness at the right elbow and provided restrictions to his right upper extremity. He advised that maximum medical improvement (MMI) had been reached.

On November 16, 2016 appellant filed a schedule award claim (Form CA-7). In support of this claim, he submitted an August 25, 2016 report in which Dr. Karen Garvey, Board-certified in internal and occupational medicine, provided an impairment rating. Dr. Garvey noted appellant's medical and surgical history, reported that appellant had difficulty with activities of daily living, and described the physical examination findings. She advised that, due to the extent of his medical history, Table 15-4, Elbow Regional Grid, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] did not fully represent his condition. Dr. Garvey provided one measurement for right upper extremity loss of motion, noting that under Table 15-33, flexion of 70 degrees yielded 8 percent upper extremity impairment, and supination of 55 degrees of supination yielded 1 percent upper extremity impairment. She found no impairment for extension and pronation. Dr. Garvey adjusted appellant's impairment under Table 15-35, based on his *Quick*DASH score of 72.5, finding an additional 0.9 percent impairment which she added to the 9 percent ROM impairment for 9.9 percent which she rounded to 10 percent right upper extremity impairment. She indicated that the date of MMI was April 28, 2016.

OWCP requested that its district medical adviser (DMA) Dr. Michael Katz, a Board-certified orthopedic surgeon, review the record, including Dr. Garvey's impairment evaluation. In

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

a January 26, 2017 report, Dr. Katz advised that, upon review of the record, there was a significant conflict in medical opinion between Dr. Askin, OWCP's second opinion physician, and Dr. Garvey, appellant's treating physician, regarding appellant's right elbow motion and recommended an additional impairment evaluation.

OWCP determined that a conflict in medical evidence had been created regarding appellant's permanent impairment. On June 8, 2017 it referred him to Dr. Roy B. Friedenthal, Board-certified in orthopedic surgery, for an impartial medical evaluation. In a July 14, 2017 report, Dr. Friedenthal noted the history of injury, his review of the medical record, and appellant's current complaints of daily throbbing right elbow pain, increased by activity, and loss of elbow motion. He indicated that appellant had medically retired on March 7, 2017. Appellant reported pain on all ROMs of the right elbow. Flexion was full to 150 degrees, extension was 0 degrees, and pronation and supination were full and symmetric to the left. There was no joint effusion, crepitus, medial or lateral instability, bursal effusion, inflammation about the olecranon bursa, soft tissue swelling or induration, and no inflammatory changes were noted. Dr. Friedenthal noted that appellant reported tenderness to light touch, and that resistive testing about the wrist did not initially produce complaints of elbow pain, but when retested and specifically asked about elbow pain on resistive testing, appellant reported discomfort at the elbow on both resisted dorsiflexion and volar flexion of the wrist. He advised that, despite multiple complaints, there were no objective findings related to the accepted conditions, noting subjective complaints of pain, loss of motion, and loss of functional capabilities which were not supported by his examination. Dr. Friedenthal indicated that, while appellant reported diffuse tenderness, this was in response to light touch and was not anatomically localized, reflecting nonphysiological factors. He concluded that appellant could have some residual sensitivity related to residual scarring that could interfere with strenuous work activities, but that he was not totally disabled. Dr. Friedenthal utilized Table 15-4 of the sixth edition of the A.M.A., *Guides*, finding a class 1 impairment for olecranon bursitis and lateral epicondylitis, noting that appellant would get the highest rating for the latter diagnosis. He found no grade modifier for physical examination (GMPE) or clinical studies (GMCS), and considered appellant's *Quick*DASH score unreliable.[4] Dr. Friedenthal indicated that he gave appellant the benefit of the doubt, finding a functional history modifier (GMFH) of 3, and applied the net adjustment formula finding zero adjustment. He concluded that appellant had five percent right upper extremity impairment, the default value for a class 1 impairment.

In a supplemental report dated August 30, 2017, Dr. Friedenthal indicated that MMI had been reached on June 27, 2017, the date of his examination. He advised that as there was no loss of motion in the elbow, that method would provide no impairment rating so the higher rating would be based on the diagnosis-based impairment (DBI) method. Dr. Friedenthal again noted that his final right upper extremity impairment rating was five percent.

By decision dated February 2, 2018, OWCP found the weight of the medical evidence rested with the opinion of Dr. Friedenthal and granted appellant a schedule award for five percent permanent impairment of the right upper extremity, for 15.6 weeks compensation, to run for the period from June 27 to October 14, 2017.

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[4] A copy of appellant's *Quick*DASH score was included in Dr. Friedenthal's report.

On February 12, 2018 counsel requested a hearing with OWCP's Branch of Hearings and Review. At the hearing, held on June 27, 2018, he maintained that Dr. Garvey's report was the most thorough. Appellant testified that his activities were limited since the employment injury with ROM issues and continued pain. He also noted that he was no longer undergoing medical treatment.

By decision dated August 22, 2018, an OWCP hearing representative found the opinion of Dr. Friedenthal was entitled to the special weight as an impartial medical examiner (IME), and affirmed the February 2, 2018 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[5] and its implementing federal regulation,[6] 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.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides, in 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).
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> "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.)[9]

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] FECA Bulletin No. 17-06 (May 8, 2017); *see also L.G.*, Docket No. 18-0519 (issued March 8, 2019).

The Bulletin further advises:

> "If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE."[10]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[11] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[12] Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[13]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than five percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

OWCP accepted appellant's claim for sprain of right elbow and forearm, contusion of right elbow, and enthesopathy of right elbow. Appellant underwent two right elbow surgeries, the first on August 17 and the second on December 14, 2015. On November 16, 2016 he filed a schedule award claim. Appellant submitted an August 25, 2016 report impairment evaluation from Dr. Garvey who found 10 percent right upper extremity impairment. Dr. Garvey indicated that the date of MMI was April 28, 2016. OWCP referred the record to its DMA, Dr. Katz who advised on January 26, 2017 that, upon review of the record, there was a significant conflict in medical opinion between Dr. Askin, OWCP's second opinion physician, and Dr. Garvey, appellant's treating physician, regarding appellant's right elbow motion. OWCP properly determined that a conflict had been created between Drs. Askin and Garvey regarding appellant's permanent impairment of the right upper extremity.[14]

OWCP referred appellant to Dr. Friedenthal who evaluated appellant on July 14, 2017. Dr. Friedenthal reported that appellant's right elbow ROM was normal, noting that appellant reported pain on all ROMs of the right elbow, but that flexion was full to 150 degrees, extension was 0 degrees, and pronation and supination were full and symmetric with the left. He determined

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[10] *Id*.

[11] 5 U.S.C. § 8123(a).

[12] *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

[13] *Id*.

[14] *Supra* note 11.

that, under the DBI method, utilizing Table 15-4,[15] appellant had a class 1 impairment for either olecranon bursitis or lateral epicondylitis. Dr. Friedenthal advised that appellant would get the highest rating for the latter diagnosis and found no GMPE or GMCS, and considered appellant's *Quick*DASH score unreliable. He found a GMFH of 3. After applying the net adjustment formula which yielded zero adjustment, he concluded that appellant had five percent right upper extremity impairment, the default value for a lateral epicondylitis class 1 impairment under Table 15-4.[16] In an August 30, 2017 supplemental report, Dr. Friedenthal indicated that MMI was reached on June 27, 2017, the date of his examination. He advised that, as there was no loss of motion in the elbow, the ROM method would provide no impairment rating so that the higher rating would be based on the DBI method. Dr. Friedenthal reiterated that his final right upper extremity impairment rating was five percent.

The Board finds that it was proper for Dr. Friedenthal to use the DBI method to rate appellant's right elbow impairment pursuant to FECA Bulletin No. 17-06 as he found no loss of ROM. Dr. Friedenthal accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition which comported with his findings.[17] As his report is detailed, well rationalized, and based on a proper factual background, his opinion is entitled to the special weight accorded an IME.[18]

On appeal, counsel contends that OWCP's August 22, 2018 decision is contrary to fact and law. For the foregoing reasons, the Board finds that appellant has not met his burden of proof to establish greater than five percent permanent impairment of the right upper extremity.

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than five percent permanent impairment of the right upper extremity, for which he previously received schedule award compensation.

[15] *Supra* note 3 at 399.

[16] *Id*.

[17] *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

[18] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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