United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 19-1601**
	)	**Issued: April 8, 2020**
U.S. POSTAL SERVICE, MIDDLESEX ESSEX PLANT, North Reading, MA, Employer	)	

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, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 22, 2019 appellant, through counsel, filed a timely appeal from a June 4, 2019 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 greater than 10 percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On December 16, 2014 appellant, then a 29-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on December 12, 2014 he developed pain and swelling in his left hand, middle/ring finger, and knuckle when the shelf/door of a postal container (postcon) closed on his left hand while in the performance of duty. He stopped work on December 12, 2014 and returned to full-time work on March 9, 2015. OWCP accepted the claim for left hand crushing injury, left wrist sprain, and partial left scapholunate ligament tear, which subsequently was expanded to include left radial styloid tenosynovitis (de Quervain's) and left ECU tendinitis. OWCP placed appellant on the supplemental rolls as of February 3, 2015. It authorized left tendon sheath incision, left forearm tendon sheath repair, and left wrist joint repair/revise, which occurred on December 28, 2015.

In a report dated July 7, 2016, Dr. Richard Choi, a Board-certified orthopedic surgeon, found appellant had reached maximum medical improvement (MMI). In a report dated July 13, 2018, he noted physical examination findings that included no sensory problems, left wrist motion of 90 percent, and strength of 70 percent when compared with right wrist motion and strength. Dr. Choi diagnosed bilateral carpal tunnel syndrome, bilateral wrist tendinitis, left wrist pain, left wrist ligament rupture, left cubital tunnel syndrome, left wrist periarthritis, left periarthritis, left hand tendinitis, and bilateral radial styloid tenosynovitis. He determined that appellant had 18 percent whole person permanent impairment.

On August 16, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated August 24, 2016, OWCP requested that Dr. Choi submit an impairment evaluation using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] It also informed appellant, on that date, that it was his responsibility to provide the required evidence and afforded him 30 days to submit this evidence.

In a September 27, 2016 report, Dr. Byron V. Hartunian, an orthopedic surgery specialist, noted appellant's history of injury and medical treatment. He utilized the sixth edition of the A.M.A., *Guides*, and provided findings which recorded that range of motion (ROM) for the left wrist was performed three times with the greatest left wrist ROM measured at 25 degrees of flexion, 40 degrees of extension, 8 degrees of radial deviation, and 18 degrees of ulnar deviation. Dr. Hartunian noted well-healed scars on the radial, dorsal, and ulnar side of the left wrist from surgery performed and that there was diffuse tenderness about the left wrist. He observed one-half inch left forearm atrophy circumferentially when compared to the right forearm, left grip and pinch weakness, and left hand sensory examination with normal limits. Dr. Hartunian reported

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

full left shoulder, elbow, forearm, and finger range of motion and restricted left wrist mobility. Using Table 15-32, page 473 for left wrist findings, he determined 7 percent impairment for loss of flexion, 3 percent for loss of extension, 3 percent for loss of radial deviation, and 3 percent for loss of ulnar deviation, which he combined to find a total 16 percent left upper extremity permanent impairment. Dr. Hartunian found that appellant reached MMI on July 7, 2016.

On February 9, 2017 OWCP's district medical adviser (DMA) noted appellant's accepted conditions, reviewed the medical record, and opined that appellant had 10 percent permanent impairment of the left upper extremity based on loss of ROM of the left wrist. He noted that the A.M.A., *Guides* ROM measurements should be rounded up or down to the nearest number ending in zero. Accordingly, the DMA rounded up or down the ROM measurements provided by Dr. Hartunian, which resulted in 30 degrees flexion, 40 degrees extension, 10 degrees radial deviation, and 20 degrees ulnar deviation. He found a grade modifier of 1 using Table 15-35, page 477 for ROM deficits less than 12 percent, and a grade modifier of 1 using Table 15-36, page 477 for functional history resulting in no change of impairment and 10 percent left upper extremity permanent impairment.

On June 30, 2017 OWCP requested that Dr. Hartunian review the DMA's February 9, 2017 report to comment on the different impairment found by the DMA.

In a letter dated July 12, 2017, counsel noted that he spoke with Dr. Hartunian who concurred with the DMA's impairment rating of 10 percent left upper extremity permanent impairment.

By decision dated November 28, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left upper extremity.

On December 4, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on May 22, 2018.

By decision dated July 23, 2018, OWCP's hearing representative set aside the November 18, 2017 schedule award determination finding that the DMA had not documented a rating of permanent impairment utilizing the diagnosis-based impairment (DBI) methodology. While the DMA noted that the DBI methodology was applicable for the diagnosis of left wrist sprain, he failed to provide a DBI impairment rating. The case was therefore remanded for the DMA to provide a proper application of the A.M.A., *Guides*.

On July 30, 2018 OWCP advised the DMA of the accepted conditions and requested clarification of the percentage of permanent impairment utilizing the DBI methodology.

In a report dated September 29, 2018, the DMA determined that the ROM methodology resulted in a greater impairment rating than the DBI methodology. He noted the diagnoses of de Quervain's, ECU tendinitis, and partial left wrist scapholunate tear. Using Table 15-3, page 395 of the A.M.A., *Guides*, the DMA identified the most appropriate diagnosis for rating purposes was a wrist sprain, as this diagnosis included de Quervain's, intersection syndrome, and nonspecific tendinitis diagnoses. This diagnosis yielded a default value of one percent. The DMA applied a grade modifier for functional history (GMFH) of one, a grade modifier for physical examination (GMPE) of two, and determined that a grade modifier for clinical studies (GMCS) of

two. He applied the net adjustment formula and found two percent permanent impairment of the upper left extremity due to appellant's left wrist sprain.

Utilizing the ROM methodology, the DMA found 10 percent permanent impairment for the left wrist. Under Table 15-32, page 473, wrist flexion of 30 degrees was given 3 percent impairment, wrist extension of 40 degrees was given 3 percent impairment, radial deviation of 10 degrees was given 2 percent impairment, and ulnar deviation of 20 degrees was given 2 percent impairment, totaling 10 percent left upper extremity permanent impairment. Using Table 15-35 and Table 15-36 on page 477, resulted in no change and 10 percent permanent left upper extremity permanent impairment.

By decision dated November 1, 2018, OWCP found that the medical evidence did not support an increase in the 10 percent permanent impairment of the left upper extremity already awarded. It noted that the DMA had applied the DBI and ROM methodologies to the examination findings provided by the treating physician.

On November 7, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on March 20, 2019.

By decision dated June 4, 2019, the hearing representative affirmed the November 1, 2018 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal regulation,[5] 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The methodology used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.[6] 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.[7]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health

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[4] *Supra* note 2.

[5] 20 C.F.R. § 10.404.

[6] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[7] *P.R.,* Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera,* 12 ECAB 348 (1961).

(ICF).[8] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by GMFH, GMPE, and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

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.)[12]
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> The Bulletin further advises:
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> "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."[13]

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[8] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] *Id*. at 385-419.

[10] *Id*. at 411.

[11] *L.I.*, Docket No. 19-0855 (issued September 24, 2019); *K.B.*, Docket No. 19-0431 (issued July 1, 2019); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[12] FECA Bulletin No. 17-06 (May 8, 2017); *see also W.H.,* Docket No. 19-0102 (issued June 21, 2019).

[13] *Id*.

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 10 percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

In a report dated July 13, 2016, Dr. Choi advised that appellant had 18 percent permanent impairment of the whole person. However, he later consented to the 10 percent permanent impairment rating proposed by the DMA. Thus, this report citing a higher level of impairment is insufficient to establish appellant's entitlement to a schedule award.

In a September 27, 2016 report, Dr. Hartunian advised that appellant had 16 percent permanent left upper extremity impairment using Table 15-32 on page 473 and left wrist ROM of 25 degrees of flexion, 40 degrees of extension, 8 degrees of radial deviation, and 18 degrees of ulnar deviation. However, the measurement for flexion, radial deviation, and ulnar deviation were not rounded up or down to the nearest number ending in zero as required by the A.M.A., *Guides*.[14] Thus, this report is of diminished probative value as it is not in compliance with the A.M.A., *Guides*.

The DMA reviewed Dr. Hartunian's report on September 29, 2016 and found 10 percent left wrist permanent impairment using the ROM method. He noted that Dr. Hartunian's ROM measurements were not valid as he failed to round up or down to the nearest number ending in zero in accordance with the A.M.A., *Guides*.

OWCP subsequent provided Dr. Hartunian a copy of the DMA's report and he concurred with the impairment calculation of 10 percent permanent impairment of the wrist. Based on the DMA's report and Dr. Hartunian's concurrence, OWCP granted appellant a schedule award for 10 percent left upper extremity impairment.

In a supplement report dated September 29, 2018, the DMA provided impairment ratings using both the DBI and ROM methodologies. He properly utilized Table 15-3, page 395 of the A.M.A., *Guides*, and identified the diagnosis as a wrist sprain, as this diagnosis included de Quervain's, intersection syndrome, and nonspecific tendinitis diagnoses. The DMA calculated that the DBI methodology resulted in a finding of two percent permanent impairment of the left upper extremity. He observed that the ROM methodology provided a greater impairment rating than the DBI methodology. Thus, he reaffirmed his original permanent impairment rating of 10 percent for the left upper extremity.

As there is no current medical evidence of record conforming to the sixth edition of the A.M.A., *Guides* demonstrating greater than 10 percent permanent impairment of the left upper extremity, appellant has not met his burden of proof to establish entitlement to an increased schedule award.[15]

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[14] A.M.A., *Guides* 464.

[15] *See J.F.*, Docket No. 19-0166 (issued July 29, 2019).

On appeal counsel asserts that the decision is contrary to fact and law. As set forth above, appellant has not submitted evidence in conformance with the sixth edition of the A.M.A., *Guides* demonstrating a greater rating of left upper extremity permanent impairment than the 10 percent previously awarded.

Appellant may request a schedule award or increased schedule award at any time 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 greater than 10 percent permanent impairment of the left upper extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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