United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 19-1455**
	)	**Issued: May 20, 2020**
DEPARTMENT OF HOMELAND SECURITY, U.S. SECRET SERVICE, Washington, DC, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 25, 2019 appellant, through counsel, filed a timely appeal from an April 22, 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 established greater than five percent permanent impairment of his left upper extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 23, 2007 appellant, then a 27-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on February 21, 2007 he hyperextended his left elbow during training while in the performance of duty. OWCP accepted the claim for left elbow ulnar collateral ligament strain. It authorized surgery for left elbow reconstruction of the medial ligament and ulnar nerve transposition, which occurred on August 18, 2007.

On September 24, 2008 appellant filed a claim for a schedule award (Form CA-7).

By decision dated January 27, 2009, OWCP granted appellant a schedule award for one percent permanent impairment of the left upper extremity. Appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated August 14, 2009, the hearing representative affirmed the January 27, 2009 decision.

Appellant, through counsel, appealed to the Board. By decision dated July 12, 2010, the Board set aside the August 14, 2009 hearing representative's decision, finding the case was not in posture for decision.[4] The Board found that the impairment rating of the district medical adviser (DMA) was insufficient to constitute the weight of the medical opinion evidence as he failed to provide adequate rationale for assigning 10 percent sensory deficit loss for appellant's ulnar nerve impairment.

On remand OWCP further developed the medical evidence. By decision dated March 2, 2011, it granted appellant an additional schedule award for four percent permanent impairment of the left upper extremity, resulting in a total schedule award of five percent permanent impairment of the left upper extremity.

On June 28, 2017 appellant, through counsel, requested an additional schedule award. In support of his request, appellant submitted a June 13, 2017 impairment evaluation, wherein Dr. Joshua B. Macht, a Board-certified internist, reviewed appellant's medical history. Dr. Macht diagnosed status post left ulnar collateral ligament reconstruction and ulnar nerve transposition. Appellant's physical examination revealed markedly positive left elbow Tinel's sign, no left upper extremity atrophy, mild tenderness on palpation of the medial left elbow, and intact left elbow

[3] Docket No. 09-2288 (issued July 12, 2010).

[4] *Id*.

motor strength. Range of motion for the left elbow was measured three times for accuracy resulting in 130 degrees elbow flexion, 0 degrees extension, 90 degrees supination, and 90 degrees pronation. Dr. Macht reported that while his examination did not reveal any instability, appellant reported incidents of sharp pain and popping when reaching behind and above, pushing, and pulling in awkward positions. Citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] Dr. Macht, using the diagnosis-based impairment methodology (DBI) and diagnosis of left ulnar collateral ligament injury, determined that appellant had six percent permanent impairment of the right upper extremity according to Table 15-7 on page 406 and Table 15-4 on page 399. He noted that it was unclear why the authors of the A.M.A., *Guides* made instability the only criteria which extended a collateral ligament injury beyond a class 0 impairment. Dr. Macht reiterated that he had been unable to reproduce instability on his examination, however occasional instability was consistent with the history appellant provided. Based on a *Quick*DASH Questionnaire of 45 out of 100 points and using Table 15-7 on page 406, Dr. Macht assigned a grade modifier for functional history (GMFH) of 2. Next, using Table 15-8 on page 408, he assigned a grade modifier for physical examination (GMPE) of 1. Dr. Macht assigned no grade modifier for clinical studies (GMCS). Using Table 15-4, page 399, he determined that appellant's condition was a grade D, class 1, which equated to six percent left upper extremity permanent impairment. Dr. Macht determined that there was either "a three percent permanent partial impairment of the right upper extremity or a five percent permanent partial impairment of the right upper extremity as a result of his right ulnar neuropathy" using Table 15-23 on page 449 and recommended diagnostic testing be performed to determine the exact extent of the impairment. Lastly, Dr. Macht opined that "[t]his impairment would be combined with the previously described impairment as a result of his right ulnar collateral ligament injury to yield a final impairment figure of 9 or 11 percent permanent partial impairment of the right upper extremity as a result of the February 21, 2007 accident."[6]

On May 11, 2018 Dr. Macht amended his June 13, 2017 impairment evaluation to reflect that the impairment rating was for the left upper extremity rather than the right upper extremity.

In a July 3, 2018 report, Dr. Jovito Estaris, Board-certified in occupational medicine, serving as OWCP's DMA reviewed the medical evidence of record and statement of accepted facts (SOAF). He noted that both range of motion (ROM) and DBI methods could be used to rate appellant's permanent impairment. The DMA provided a DBI impairment rating of zero percent permanent impairment citing to Table 15-4, page 399 of the sixth edition of the A.M.A., *Guides*, for a diagnosis of left elbow ulnar collateral ligament tear. He indicated his disagreement with Dr. Macht's assignment of class 1 for appellant's ulnar collateral ligament injury under Table 15-4 as Dr. Macht specifically related that there was no evidence of instability during appellant's physical examination. Regarding Dr. Macht's impairment rating for ulnar nerve compression, the DMA explained that the A.M.A., *Guides* at page 445 required electromyography (EMG) or nerve conduction velocity (NCV) studies be obtained to rate the impairment under Table 15-23, page 449. He noted that Dr. Macht assigned an impairment rating for ulnar nerve compression at the elbow without any supporting EMG/NCV studies. Therefore, the DBI methodology of rating of permanent impairment for appellant's left shoulder elbow ulnar collateral ligament tear and ulnar

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

[6] In CA-7 forms dated November 21, 2017 and April 11, 2018, appellant filed claims for a schedule award.

nerve compression amounted to zero percent of the left upper extremity. Next, the DMA noted that Dr. Macht did not use the ROM method in his impairment calculation. He proceeded to evaluate appellant's permanent impairment under the ROM methodology found at Table 15-22 on page 474 of the A.M.A., *Guides.* The DMA found that appellant's flexion of 130 degrees yielded three percent permanent impairment, 0 degrees of extension yielded zero percent permanent impairment, 90 degrees pronation yielded zero percent permanent impairment and 90 degrees supination yielded zero percent permanent impairment, totaling three percent left upper extremity permanent impairment, utilizing the ROM methodology. Thus, the he concluded that appellant had three percent left upper extremity permanent impairment and, therefore, no additional schedule award was warranted.

By decision dated October 4, 2018, OWCP found that appellant was not entitled to an additional schedule award. It found that the weight of the medical opinion evidence was represented by the DMA's July 3, 2018 report.

On October 11, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on February 13, 2019.

By decision dated April 22, 2019, OWCP's hearing representative affirmed the October 4, 2018 denial of appellant's claim for an additional schedule award. She found the weight of the medical opinion evidence was represented by the well-rationalized report of the DMA.

LEGAL PRECEDENT

The schedule award provisions of FECA,[7] and its implementing federal regulation,[8] 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 method 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.[9] 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.[10]

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

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] 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).

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

and Health (ICF).[11] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by GMFH, GMPE, and GMCS.[12] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[14]

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).
>
> "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.)[15]
>
> 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."[16]

ANALYSIS

The Board finds that appellant has not established greater than five percent permanent impairment of the left upper extremity, for which he previously received schedule award compensation.

[11] 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.

[12] *Id.* at 383-492.

[13] *Id.* at 411.

[14] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

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

[16] *Id.*

In support of his schedule award claim appellant submitted a June 13, 2017 permanent impairment evaluation and a May 11, 2018 addendum report from Dr. Macht. Using A.M.A., *Guides* and DBI methodology, Dr. Macht determined that appellant had six percent permanent impairment of the left upper extremity according to Table 15-7 on page 406 and Table 15-4 on page 399 for his left ulnar collateral ligament tear and either a three or five percent impairment of the left upper extremity using Table 15-23 on page 449 for the diagnosis of ulnar nerve compression. Dr. Macht then combined the impairment ratings for the left ulnar neuritis and left ulnar neuropathy impairment ratings, resulting in a 9 or 11 percent permanent impairment of left upper extremity. He did not provide an impairment rating using the ROM methodology, but did provide ROM measurements.

The DMA reviewed Dr. Macht's reports on July 3, 2018 and concluded that the ROM methodology provided a greater impairment than the DBI methodology. He disagreed with Dr. Macht's assignment of class 1 for appellant's ulnar collateral ligament injury under Table 15 4 because Dr. Macht had related that appellant had no evidence of instability on physical examination. The Board also notes that while Dr. Macht related that appellant had occasional instability based upon his history, he did not actually document any instability in his recitation of appellant's complaints.[17] Since Table 15-4 requires occasional recurrent instability for rating of a collateral ulnar ligament injury, as a class 1 impairment, the DMA properly assigned a class 0, and found that appellant's collateral ulnar ligament injury would be rated as zero percent permanent impairment. The DMA also disagreed with Dr. Macht's ulnar nerve compression impairment rating. He properly noted that the A.M.A., *Guides* required supporting EMG/NCV studies before a permanent impairment rating could be made under Table 15-23. Thus, the DMA found zero percent permanent impairment using Table 15-23 on page 449 for the diagnosis of ulnar nerve compression. Utilizing the ROM methodology found in Table 15-33 on page 474, he properly concluded that appellant had three percent left upper extremity permanent impairment using ROM methodology and ROM findings from Dr. Macht's report, based upon his 130 degrees of elbow flexion.

The Board finds that the DMA discussed how he arrived at his conclusion by listing specific tables and pages in the A.M.A., *Guides* and he properly interpreted the sixth edition of the A.M.A., *Guides* to find that appellant had three percent permanent impairment of the left upper extremity and was not entitled to an additional schedule award. Therefore, the DMA's opinion is given the weight of the medical evidence and supports that appellant does not have greater than the five percent upper extremity permanent impairment previously awarded.[18]

There is no current medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has greater than the five percent permanent impairment of the left upper extremity previously awarded. Accordingly, appellant has not met his burden of proof to establish that he is entitled to an additional schedule award.

[17] Dr. Macht noted appellant's complaints of occasional pain and "popping" of the left elbow, but he did not explain that the complaint of "popping" constituted instability of the elbow.

[18] *R.R.*, Docket No. 17-1947 (issued December 19, 2018).

On appeal counsel asserts that the decision is contrary to law and fact. As set forth above, appellant has not established greater than the five percent permanent impairment of the left upper extremity 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 established greater than five percent permanent impairment of his left upper extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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