United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 17-0335**
	)	**Issued: July 26, 2017**
U.S. POSTAL SERVICE, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 30, 2016 appellant, through counsel, filed a timely appeal from an August 19, 2016 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.

ISSUE

The issue is whether appellant has established more than two percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

[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.*

FACTUAL HISTORY

On September 23, 2009 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on September 18, 2009, he sprained his left wrist when he slipped on wet leaves and fell down in the performance of duty. He did not stop work.

OWCP accepted his claim for left wrist sprain and left cubital tunnel syndrome.

On November 7, 2009 appellant stopped work and filed various claims for wage-loss compensation (Form CA-7) as of that date. OWCP paid disability compensation benefits on the supplemental rolls commencing November 7, 2009.[3] Appellant underwent authorized decompression of the ulnar nerve, anterior transposition of ulnar nerve, and posterior splint application on January 26, 2011. On May 23, 2013 he returned to full-time modified duty.[4]

On September 21, 2015 appellant filed a claim for a schedule award (Form CA-7).

In support of his schedule award claim, appellant submitted a May 19, 2015 report from Dr. Nicholas Diamond, a physiatrist. Dr. Diamond referenced appellant's September 18, 2009 employment injury and reviewed his medical history. He related appellant's complaints of left elbow pain and stiffness and left hand numbness and tingling. Dr. Diamond reported that appellant had a *Quick*DASH score of 63 involving the left upper extremity. Upon examination of appellant's left elbow, Dr. Diamond observed olecranon tenderness and medial epicondyle tenderness. Tinel's sign was positive. Range of motion (ROM) testing was full. Upon examination of appellant's left wrist, Dr. Diamond observed palmar tenderness over the ulnar aspect. Cervical compression and Finkelstein tests were positive. Dr. Diamond noted that ROM testing was performed three times. He reported decreased ROM with flexion to 60 degrees with pain, palmar-flexion to 60 degrees with pain, radial deviation of 20 degrees, and ulnar deviation of 20 degrees. Sensory examination revealed a perceived decreased sensation over the left ulnar and median nerves. Dr. Diamond diagnosed post-traumatic left elbow contusion/sprain, post-traumatic left ulnar nerve neuropathy at the elbow, status post left cubital tunnel ulnar nerve decompression and transportation of ulnar nerve with post-splint application, post-traumatic left wrist/hand contusion with left dorsal wrist hamate fracture, and post-traumatic left carpal tunnel syndrome. He opined that the work-related injury of September 18, 2009 was the competent producing factor for appellant's subjective and objective findings.

Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009), Table 15-23, page 449, Dr. Diamond reported that appellant had six percent permanent impairment for left elbow ulnar nerve entrapment neuropathy. He related grade modifiers of one for test findings, three for functional history, and two for physical examination, which resulted in five percent impairment, increased to six percent due to the 63 *Quick*DASH score. Dr. Diamond also noted a diagnosis for left elbow median

[3] OWCP paid compensation benefits on the periodic rolls effective July 3, 2011.

[4] On September 30, 2013 OWCP terminated appellant's wage-loss compensation benefits based on his actual wages as a modified letter carrier. It determined that his current wages exceeded the current wages of the job he held when injured and, accordingly, he was no longer entitled to wage-loss compensation benefits.

nerve entrapment and reported grade modifiers of one for test findings, two for physical examination, and three for functional history. After applying the net adjustment formula, he calculated three percent permanent impairment rating. Dr. Diamond also referred to Table 15-3, page 396, for appellant's left hamate wrist fracture. He indicated grade modifiers of three for functional history and two for physical examination and applied the net adjustment formula, which resulted in a left upper extremity permanent impairment of five percent. Dr. Diamond reported a date of maximum medical improvement (MMI) of May 19, 2015. He concluded that appellant had a total left upper extremity permanent impairment of 14 percent.

Dr. Mark Avart, an orthopedic surgeon, indicated in a September 24, 2015 note that he reviewed Dr. Diamond's impairment rating report and agreed with his finding that appellant had a 14 percent permanent impairment of the left upper extremity.

In an October 19, 2015 report, Dr. Morley Slutsky, a Board-certified occupational medicine specialist and an OWCP medical adviser, reviewed Dr. Diamond's report and the statement of accepted facts and referenced appellant's accepted conditions of left wrist sprain and left ulnar nerve lesion. He noted that Dr. Diamond provided an impairment rating for the accepted conditions of wrist sprain and lesion of the left ulnar nerve, as well as the nonaccepted conditions of left hamate fracture and left carpal tunnel syndrome. Dr. Slutsky explained that, since the two later diagnoses were not accepted conditions, he would not address them in his report. He reported a date of MMI of May 19, 2015. Dr. Diamond referenced Table 15-23, page 449, and assigned a diagnosis of left cubital tunnel syndrome. He indicated grade modifiers of one for clinical studies, one for functional history, and one for physical examination, which resulted in an adjustment of one after applying the net adjustment formula. Dr. Diamond concluded that appellant had two percent permanent impairment of the left upper extremity. He referenced Appendix 15-B, page 488, and noted that conduction block was not present per the A.M.A., *Guides* criteria. Dr. Slutsky also noted that, as Dr. Diamond had not found a left wrist sprain, there was no impairment rating for this condition.

Dr. Avart examined appellant again and in a November 12, 2015 progress note related his complaints of continued left elbow pain and chronic cubital tunnel syndrome post-traumatic from work and chronic weakness. Upon physical examination, Dr. Avart observed decreased grip strength with mild tingling and parethesias into the small finger of the left hand. He also reported medial epicondylitis with pain radiating into the medial forearm.

In a decision dated February 9, 2016, OWCP granted appellant a schedule award for two percent permanent impairment of his left upper extremity.

On February 18, 2016 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on June 14, 2016. Counsel was present. Appellant indicated that he started work as a letter carrier for the employing establishment in May 1999. He described the September 18, 2009 employment injury and the medical treatment he had received as a result of his employment injury. Counsel related a request for appellant's claim to be expanded to include the conditions of left dorsal wrist hamate fracture and left carpal tunnel syndrome. She noted that an October 20, 2009 left wrist computerized tomography (CT) scan showed the fracture. Counsel asserted that Dr. Diamond found a left ulnar nerve impairment rating to be a total of six percent and noted that Dr. Slutsky had not examined appellant. She

alleged that, at the very least, a conflict of medical opinion evidence existed between Dr. Diamond and Dr. Slutsky regarding appellant's impairment rating and should be referred for an impartial medical examination.

Appellant submitted a July 14, 2015 progress note by Dr. Avart who related appellant's complaints of persistent left elbow pain. Upon physical examination, he observed left elbow medial epicondylitis with pain radiating along the ulnar forearm with a minimal Tinel's present. Grip strength was decreased. Dr. Avart reported paresthesias in the small and ring finger on the left hand. Muscle strength was 4/5. He recommended that appellant work with restricted use of the left arm.

By decision dated August 19, 2016, an OWCP hearing representative affirmed the schedule award decision. He determined that because Dr. Diamond incorrectly included a diagnosis of left hamate fracture in his impairment rating, OWCP properly based its schedule award decision on Dr. Slutsky's impairment rating report.[5]

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 FECA program with the Director of OWCP.[6] 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.[7] 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.[8]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A., *Guides* 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.

[5] The hearing representative also denied expanding appellant's claim to include a left hamate fracture. She noted that an October 20, 2009 CT scan indicated that a fracture was questionable, and there was insufficient medical evidence to establish an additional condition.

[6] *See* 20 C.F.R. §§ 1.1-1.4.

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

[8] 20 C.F.R. § 10.404. *See also, Ronald R. Kraynak*, 53 ECAB 130 (2001).

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (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]

Section 8123(a) provides that, if there is a 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] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationale and based upon a proper factual background, must be given special weight.[13]

ANALYSIS

The issue on appeal is whether appellant has more than two percent permanent impairment of his left upper extremity, for which he previously received a schedule award. The accepted conditions in this case are left wrist sprain and left cubital tunnel syndrome.

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

Regarding the accepted condition of left cubital tunnel syndrome, the Board notes that Dr. Diamond rated appellant for left elbow ulnar nerve entrapment neuropathy, and left elbow median nerve entrapment. He related various grade modifiers ranging from one for clinical studies, to two and three for physical examination, and functional history. Dr. Slutsky, however, assigned the diagnosis of left cubital tunnel syndrome, and related grade modifiers of one for each of clinical studies, functional history, and physical examination. The opinions of record are in conflict as to the modifier degree to be applied to the impairment values. The Board therefore

[9] *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).

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

[11] 5 U.S.C. § 8123(a).

[12] 20 C.F.R. § 10.321.

[13] *F.C.*, Docket No. 14-0560 (issued November 12, 2015).

finds a conflict in medical opinion as to the extent of permanent impairment to appellant's left upper extremity caused by his accepted injury.[14]

Regarding the accepted condition of left wrist sprain, appellant's treating physician, Dr. Diamond, noted the accepted conditions and provided ROM findings for appellant's left wrist. However, Dr. Slutsky, OWCP's medical adviser, related that Dr. Diamond had not found residuals of a left wrist strain.

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 has been followed regarding the proper use of the diagnosis-based impairment (DBI) or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[15] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[16] 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 has observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were 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.[17]

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 August 19, 2016 decision of OWCP. Utilizing a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and after such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

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

[14] *D.G.*, Docket No. 10-2267 (issued August 24, 2011). The Board found a conflict in medical opinion between appellant's treating physician and OWCP's district medical adviser regarding the degree of permanent impairment based upon assignment of differing grade modifiers.

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

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

[17] *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision

Issued: July 26, 2017
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