

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

G.C., Appellant)

and)

DEPARTMENT OF JUSTICE, BUREAU OF)
PRISONS, FEDERAL CORRECTION)
INSTITUTE, Jessup, GA, Employer)

Docket No. 11-82
Issued: October 12, 2011

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 13, 2010 appellant, through her attorney, filed a timely appeal of the September 8, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has established that she is entitled to a schedule award for an employment-related impairment to her left upper extremity.

On appeal appellant, through counsel, contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 7, 2004 appellant, then a 49-year-old correctional officer, filed a traumatic injury claim alleging that, on January 6, 2004, while climbing out of a tractor/trailer after inspecting its contents, she lost her balance and when she grabbed the side of the trailer with her left hand she sustained an injury to her left shoulder. By decision dated May 10, 2004, OWCP accepted her claim for left shoulder impingement syndrome. It later accepted appellant's claim for aggravation of cervical spondylosis without myelopathy and authorized surgery. OWCP paid compensation and medical benefits.

On April 5, 2008 appellant filed a claim for a schedule award.² OWCP forwarded her file to its medical adviser for an impairment rating. By note dated April 22, 2008, OWCP's medical adviser determined a current medical report was necessary and a date of maximum medical improvement. OWCP requested, by letter dated April 24, 2008, that appellant's treating physician provide an impairment rating.³

In a May 1, 2008 report, Dr. Keith A. Kirby, a Board-certified physiatrist with a subspecialty in pain medicine, indicated that appellant had a permanent disability rating of 29 percent utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He noted that she fell into a Cervical Diagnosis-Related Estimate (DRE) Category 15 per Table 15.5 on page 392 of the A.M.A., *Guides*. Dr. Kirby allotted 28 percent impairment plus 1 percent additional impairment for appellant's fusion at second level.

OWCP forwarded Dr. Kirby's report to its medical adviser, who noted that whole person ratings and diagnosis-based estimates are not recognized by it. OWCP's medical adviser copied the appropriate pages of the A.M.A., *Guides*, for Dr. Kirby to review. OWCP referred these notes to Dr. Kirby on July 24, 2008 and requested a revised report.

A supplemental note from Dr. Kirby was not received by OWCP until January 16, 2009, in which he simply referred to his previously submitted work status report of May 1, 2008. Dr. Kirby did not provide any additional impairment ratings.

By letter dated June 17, 2009, OWCP referred appellant to Dr. H. Clark Deriso, a Board-certified orthopedic surgeon, to resolve a purported conflict between Dr. Kirby and OWCP's medical adviser with regards to her impairment rating. It instructed Dr. Deriso to apply the sixth edition of the A.M.A., *Guides*. In his July 21, 2009 report, Dr. Deriso stated that, pursuant to the A.M.A., *Guides* (6th edition, 2009), appellant qualified for nine percent whole body permanent impairment due to disc surgery. He further noted that there was no measurable impairment in

² OWCP had previously sent appellant to a second opinion examination on October 5, 2005 with Dr. Steven Lancaster, Board certified in orthopedic surgery, to assess any continuing disability. In that report, Dr. Lancaster noted that appellant had a spinal impairment which is not rated, but noted that "she does have weakness about the left shoulder in abduction, and as per page 510, table 16-35 in the A.M.A. *Guides*, would have a 3 percent upper extremity impairment rating for her loss of abduction strength."

³ Appellant elected to receive retirement benefits in lieu of workers' compensation benefits effective April 17, 2008.

regards to her left shoulder since she had an essentially normal examination and there was no evidence of rotator cuff injury.

By letter to Dr. Deriso dated September 30, 2009, OWCP noted that schedule awards may not be paid for impairment to the back although such awards could be paid for impairment of the upper extremities. Therefore it asked Dr. Deriso to calculate if there was any impairment to appellant's upper extremities as a result of the job-related neck or upper back injury pursuant to the sixth edition of the A.M.A., *Guides*.

In a response dated October 5, 2009, Dr. Deriso stated that appellant had typical cervical discogenic pain of the upper extremities only, and qualifies for approximately nine percent impairment due to cervical fusions pursuant to Table 17-2 of the A.M.A., *Guides* (6th ed.) OWCP forwarded his report to its medical adviser who noted that Dr. Deriso used Chapter 17 of the sixth edition of the A.M.A., *Guides*, a chapter discussing the spine, to indicate that appellant had nine percent whole person impairment. OWCP's medical adviser reiterated that OWCP did not recognize whole person impairment and recognizes only impairments involving the extremity. Further, he noted that appellant had only subjective complaints in the spine. Accordingly, OWCP's medical adviser opined that, without objective findings in the extremities, there was no impairment, and that appellant had a zero percent impairment in both the right and left upper extremity.

In a November 20, 2009 letter, OWCP again asked Dr. Deriso for a percentage of impairment of the upper extremities and an explanation as to how he calculated the impairment. In a response dated November 23, 2009, Dr. Deriso stated that there was no impairment to appellant's upper extremities since she had no abnormalities of the upper extremities. Accordingly, he indicated that the A.M.A., *Guides* of the sixth edition did not need to be utilized.

By letter dated February 3, 2010, a new medical adviser had reviewed Dr. Deriso's report and stated that the referee had correctly applied the A.M.A., *Guides* in calculating permanent impairment as zero percent of the upper extremities as appellant had no abnormalities of the upper extremities.

By decision dated February 26, 2010, OWCP found that appellant was not entitled to a schedule award for impairment to the left upper extremity as there were no abnormalities to the upper extremities.

By letter dated March 10, 2010 appellant, through counsel, requested a telephonic hearing before OWCP's hearing representative.

At the hearing held on June 4, 2010, appellant's counsel argued that OWCP's medical adviser should not have just dismissed the report finding 29 percent impairment of the whole person but rather should have taken the findings on examination and computed them under the proper edition of the A.M.A., *Guides*. Appellant also testified about the residuals in her left shoulder, noting that she still had a nerve burn and received cortisone injections.

Appellant submitted a June 20, 2010 report by Dr. William N. Grant, a Board-certified internist, who noted that he did not see her in his office but rather evaluated her by telephone and that he reviewed the records provided by her attorney. Dr. Grant indicated that she had constant

pain, paresthesias and weakness in her left shoulder and that her discomfort level is a level six. He listed appellant's diagnosis as left shoulder region disc and cervical spondylosis. Dr. Grant noted that, with repetitive movement, her pain becomes unbearable. He noted that appellant had a *QuickDash* score of 72. Under the category physical examination, Dr. Grant noted that there was a surgical scar to the anterior left base of her neck, as per appellant. He also noted that there was flexion to 100 degrees which is 3 percent upper extremity impairment, extension to 100 degrees which is a 3 percent upper extremity impairment, internal rotation at 40 percent which is a 4 percent impairment and external rotation to 40 degrees which is a 4 percent impairment pursuant to Table 15-34 on page 474 of the A.M.A., *Guides* (6th ed.). Dr. Grant summarized appellant's range of motion in her left shoulder by adding 3 percent plus 3 percent plus 4 percent plus 4 percent for an upper extremity impairment of 14 percent. He then added findings for peripheral nerve impairment to the left shoulder. Dr. Grant noted that appellant has a Diagnosed Condition (CDX) of two as per Table 15-21 on page 441 of the A.M.A., *Guides*. He found that Functional History (GMFH) involved a grade 3 modifier because of a *QuickDash* score of 77 and pain/symptoms with less than normal activity. Dr. Grant found Physical Examination (GMPE) equaled a grade 2 modifier as per Table 15-89 on page 408. This resulted in a net adjustment of one. Dr. Grant found that this resulted in 23 percent impairment. Adding this to the 14 percent impairment for range of motion, he concluded that appellant has an impairment of 34 percent of the left upper extremity.

By decision dated September 8, 2010, OWCP's hearing representative affirmed the February 26, 2010 OWCP decision.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations⁴ 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 of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.⁵ For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

⁴ 20 C.F.R. § 10.404.

⁵ *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

⁶ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

FECA does not authorize the payment of schedule awards for the permanent impairment of the whole person.⁸ Payment is authorized only for the permanent impairment of specified members, organs or functions of the body. No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.⁹ Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,¹⁰ no claimant is entitled to such an award.¹¹ Amendments to FECA, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.¹²

The sixth edition requires identifying the impairment class for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE and clinical studies (GMCS).¹³ The net adjustment formula is GMFH-CDX + GMPE-CDX + GMCS-CDX.

If there is disagreement between the physician making the examination for OWCP and the employee's physician, it shall appoint a third physician who shall make an examination.¹⁴ In situations when there exists 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 rationalized and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS

OWCP accepted appellant's claim for left shoulder impingement syndrome and aggravation of cervical spondylosis without myelopathy; however, it denied her claim for a schedule award.

The Board finds that there was no conflict of medical evidence at the time of OWCP's referral to Dr. Deriso for an impartial medical opinion. As Dr. Kirby had not properly utilized the A.M.A., *Guides*, in rendering his impairment rating, there was no valid impairment rating. Dr. Kirby, in his May 1, 2008 report, indicated that appellant had 29 percent impairment, noting that she fell into a Cervical DRE Category 15 per the A.M.A., *Guides*. OWCP's medical adviser

⁸ *William Edwin Muir*, 27 ECAB 579 (1976); *K.P.*, Docket No. 10-1131 (issued February 18, 2011).

⁹ *Id.*

¹⁰ FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹¹ *Timothy J. McGuire*, 34 ECAB 189 (1982).

¹² *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹³ A.M.A., *Guides* 494-531

¹⁴ 5 U.S.C. § 8123(a); *see also K.M.*, Docket No. 11-10 (issued August 3, 2011).

¹⁵ *See K.M.*, *supra* note 12; *James P. Roberts*, 31 ECAB 1010 (1980).

concluded Dr. Kirby was actually reporting a whole person impairment which was prohibited.¹⁶ Dr. Kirby did not respond to OWCP's requests to further clarify his report on appellant's impairment under FECA.

Therefore, there was no conflict of medical evidence at the time of referral to Dr. Deriso. The Board finds that, although Dr. Deriso's reports are not entitled to the special weight afforded to the opinion of an impartial medical specialist, his report can still be considered to be a second opinion.¹⁷

Dr. Deriso initially found nine percent whole body impairment. However, as FECA does not allow for schedule awards for impairments to the whole person, OWCP asked Dr. Deriso for clarification.¹⁸ Dr. Deriso later clarified that appellant did not have any impairment to his upper extremities since she had no objective abnormalities of the upper extremities. Therefore, the application of the A.M.A., *Guides* was unnecessary. This was consistent with the first medical adviser and the second OWCP's medical adviser concurred in this impairment rating. The Board finds there is no medical evidence in the record warranting any permanent impairment rating.

Dr. Grant found that appellant had 34 percent impairment of the left upper extremity. However, his opinion is not entitled to any weight as it does not constitute a well-rationalized opinion based on detailed findings on physical examination as he evaluated her over the telephone, and reviewed unspecified medical reports provided by counsel.

Therefore, the Board finds that no physician found that appellant had a ratable impairment to her upper extremities and OWCP properly denied appellant's claim for a schedule award.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that she is entitled to a schedule award.

¹⁶ See *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁷ *R.C.*, Docket No. 09-2217 (issued September 8, 2010).

¹⁸ *Id.*; see also *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 8, 2010 is affirmed.

Issued: October 12, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board