United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 12-47**
	)	**Issued: May 23, 2012**
DEPARTMENT OF HOMELAND SECURITY, U.S. BORDER PATROL, El Centro, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 11, 2011 appellant filed a timely appeal from the September 30, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he is entitled to more than a 7 percent impairment of the right upper extremity or more than a 13 percent impairment of the left lower extremity for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been on appeal before the Board.[2] In a December 20, 2004 decision, the Board affirmed the April 16, 2004 OWCP decision, finding that appellant failed to establish a recurrence of disability from January 27, 2002 through December 17, 2003 or that his need for medical treatment was causally related to his June 21, 1991 employment injury. The facts and the history contained in the prior appeal are incorporated by reference.

The relevant facts include that appellant's claim was accepted for a right shoulder sprain, left knee internal derangement, lateral meniscus and lateral collateral ligament injury as being work related. On September 4, 1991 appellant underwent left knee arthroscopy with arthroscopic chondroplasty and resection of plica. On November 9, 1992 he received a schedule award for a 13 percent impairment of the left leg. On January 15, 2010 appellant underwent status post right shoulder arthroscopy with arthroscopic debridement, subacromial decompression and modified Mumford procedure. On January 29, 2010 he claimed a schedule award for his shoulder and left leg.

In a September 15, 2010 report, Dr. Veerinder S. Anand, a Board-certified orthopedic surgeon and treating physician, diagnosed right shoulder rotator cuff tear, and status post humeral joint shaving with subacromial depression, modified Mumford and pain pump insertion on July 15, 2010. He indicated that appellant reached maximum medical improvement and was permanent and stationary. Dr. Anand noted that appellant had decreased right shoulder range of motion and referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001). He opined that appellant had 15 percent impairment of the right upper extremity or nine percent whole person impairment.

In a March 28, 2011 report, OWCP's medical adviser reviewed the medical evidence and determined that there was inadequate information to make a determination as to the extent of appellant's impairment in either his right arm or his left leg. He explained that additional information was needed to make an impairment rating. The medical adviser indicated that the impairment rating should be based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2008) hereinafter (A.M.A., *Guides*).

OWCP received an updated report regarding the right shoulder from Dr. Anand, utilizing the sixth edition of the A.M.A., *Guides*. Dr. Anand explained that appellant was being rated for his post-subacromial decompression, modified Mumford and surgery for rotator cuff tear. He indicated that appellant had decreased motion, which was his primary resulting impairment and he referred to Table 15-34 for range of motion.[3] Dr. Anand found 170 degrees of flexion, 170 degrees of abduction, 80 degrees of external rotation and 30 degrees of internal rotation. He determined that appellant had impaired flexion of three percent and internal rotation of four percent. Dr. Anand added these values and opined that appellant had seven percent upper extremity impairment. He referred to Table 15-35,[4] and explained that this was consistent with a

[2] Docket No. 04-1614 (issued December 20, 2004).

[3] A.M.A., *Guides* 475.

[4] *Id.* at 477.

grade modifier of 1. Dr. Anand noted that the functional grade modifier was also one and no adjustment to the impairment was warranted. He opined that appellant had seven percent right upper extremity impairment.

In a June 15, 2011 report, Dr. Anand provided an impairment rating for the left knee. He examined appellant and determined that appellant had mild discomfort medially in the left knee. Dr. Anand found that: the Apley test caused discomfort; the McMurray's test was negative; stress testing was negative; Lachman's examination was negative; pivot, shift test was negative and there was no thigh or calf atrophy. He determined that strength was normal throughout and sensation was intact. Dr. Anand found flexion of 130 degrees. He referred to Table 16-3[5] and noting it was a soft tissue injury found it a class 1 with a default rating (C) which was equivalent to one percent. Dr. Anand advised that based on the adjustment modifiers appellant's impairment moved to a (B) which also resulted in a one percent impairment of the left lower extremity. He advised that this would be converted to a one percent whole person impairment.

In a July 26, 2011 report, OWCP's medical adviser referred to Table 15-5[6] and explained that appellant had seven percent upper extremity impairment for residual problems with the right shoulder status post right shoulder arthroscopy and Mumford procedure. He referred to Table 16-3[7] and determined that appellant had a one percent impairment of the lower extremity as a result of documented osteochondral defect in the patella with post-traumatic chondromalacia. The medical adviser found that appellant had reached maximum medical improvement on September 15, 2010. He noted that this was the sole impairment of the left lower extremity and was less than the 13 percent impairment previously awarded for the left leg.

On September 30, 2011 OWCP granted appellant a schedule award for 7 percent permanent impairment of the right upper extremity and 13 percent of the left lower extremity. However, it explained that the one percent of the left lower extremity was "cancelled out" as appellant had previously received an impairment of 13 percent on November 9, 1992. The award covered a period of 21.84 weeks from September 15, 2010 to February 14, 2011.

LEGAL PRECEDENT

The schedule award provision of FECA,[8] and its implementing federal regulations,[9] 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

[5] *Id.* at 509.

[6] *Id.* at 403.

[7] *Id.* at 511.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[10] For decisions issued after May 1, 2009, the sixth edition will be used.[11]

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 and Health (ICF).[12] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[14]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[15]

ANALYSIS

OWCP accepted appellant's claim for a right shoulder sprain, left knee internal derangement, lateral meniscus and lateral collateral ligament injury. Appellant underwent status post right shoulder arthroscopy with arthroscopic debridement, subacromial decompression and modified Mumford procedure on January 15, 2010. However, the evidence of record is insufficient to establish that appellant is entitled to more than 7 percent impairment of the right upper extremity or more than 13 percent of the left lower extremity for which he received a schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

In support of his claim, appellant submitted several reports from his treating physician, Dr. Anand. In a September 15, 2010 report, Dr. Anand opined that appellant had 15 percent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides*. However, this report is insufficient to establish any employment-related permanent impairment of the right upper extremity as Dr. Anand did not rate impairment under the sixth edition of the A.M.A., *Guides*. As noted, OWCP began using the sixth edition of the A.M.A., *Guides* effective May 1, 2009.

The Board notes that OWCP subsequently received updated reports dated November 15, 2010 and June 15, 2011 from Dr. Anand. Both Dr. Anand and OWCP's medical adviser

[10] *Id*. at § 10.404(a).

[11] FECA Bulletin No. 09-03 (issued March 15, 2009).

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

[13] *Id*. at 383-419.

[14] *Id*. at 411.

[15] See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

provided the same recommendation with regard to the amount of impairment. Regarding the left lower extremity, the medical adviser explained that appellant had previously received an impairment of 13 percent, and that the present rating of 1 percent, was the sole impairment of the left lower extremity, thus no additional impairment would be warranted.

In his November 15, 2010 report, Dr. Anand utilized the sixth edition of the A.M.A., *Guides* and provided an impairment rating for the right shoulder based upon decreased motion. He referred to Table 15-34 for range of motion and determined that appellant had one percent impairment for 170 degrees flexion and four percent impairment for 30 degrees internal rotation. Dr. Anand added these values and opined that appellant had seven percent upper extremity impairment.[16] Under Tables 15-35 and 15-36, he properly considered the effect of appellant's functional history on his rating related to limited right shoulder motion and determined that no change in the rating was warranted.[17]

In his June 15, 2011 report, Dr. Anand provided an impairment rating for the left knee. His examination findings included mild discomfort medially in the left knee and normal strength. Dr. Anand referred to Table 16-3 and determined soft tissue injury would place appellant into a class 1 with a default rating (C) which was equivalent to one percent. He advised that based on the adjustment modifiers, appellant's impairment moved to a (B) which also resulted in a one percent impairment of the left lower extremity.[18]

The medical adviser found the same degree of impairment of the right upper extremity as Dr. Anand.[19] He concurred with Dr. Anand that appellant had one percent impairment of the left leg under Table 16 at page 511. The medical adviser noted that this was the result of a documented osteochondral defect in the patella with post-traumatic chondromalacia. He stated that this was the sole impairment of the left lower extremity, and would not entitle appellant to an increased impairment as he had previously been awarded 13 percent impairment for the left leg due to his left knee injury.

The Board finds that the updated reports of Dr. Anand and the medical adviser establish that appellant has no more than 7 percent impairment of the right upper extremity or more than 13 percent of the left lower extremity for which he received a schedule award. As noted above, the medical adviser explained why the 1 percent of the left lower extremity did not result in a

[16] A.M.A., *Guides* 475.

[17] *Id.* at 477.

[18] Dr. Anand converted his impairment ratings to whole person ratings, but a schedule award is not payable for impairment to the body as a whole. *N.M.*, 58 ECAB 273 (2007).

[19] Although the medical adviser agreed on the impairment percentage with Dr. Anand, the medical adviser based his determination on a diagnosis-based impairment under Table 15-5 on page 403 on residual problems following his shoulder surgery. Dr. Anand based his impairment rating on lost shoulder range of motion, under Table 15-34 on page 475 of the A.M.A., *Guides*. While the A.M.A., *Guides*, allow the use of range of motion as an alternative to Table 15-5 to determine impairment, the A.M.A., *Guides* explains that range of motion impairment cannot be combined with diagnosis-based impairment. *See* A.M.A., *Guides* 405, 461.

greater award over the prior award of 13 percent.[20] Appellant has not shown entitlement to a greater award.

On appeal, appellant disagreed with the amount of his schedule award. He alleged that his condition had worsened, his mobility was more restricted and his pain had increased. However, the medical evidence does not support a greater award. There is no current medical evidence of record supporting any greater impairment under the sixth edition of the A.M.A., *Guides*. Appellant may request a schedule award or increased schedule award based upon 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 did not meet his burden of proof in establishing that he was entitled to more than 7 percent impairment of the right upper extremity or more than 13 percent impairment of the left lower extremity for which he received a schedule award.

[20] FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2011 Office of Workers' Compensation Programs' decision is affirmed.

Issued: May 23, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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