

D.O., Appellant

and

**U.S. SENATE SERGEANT-AT-ARMS,
LAW ENFORCEMENT & SECURITY
OPERATIONS, Washington, DC, Employer**

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

DECISION AND ORDER

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 3, 2014 appellant filed a timely appeal from a July 8, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established any permanent impairment based on his accepted cervical condition.

On appeal appellant argues that a Dr. Harold Pye's April 5, 2013 report established five percent impairment of the right upper extremity and four percent impairment of the left upper extremity due to his cervical injury.

¹ 5 U.S.C. § 8101-8193.

FACTUAL HISTORY

On July 2, 2008 appellant, then a 62-year-old deputy assistant Sergeant-at-Arms, was moving a filing cabinet to retrieve a bag that had fallen behind it when he felt a pop in his right shoulder. OWCP accepted the conditions of right shoulder rotator cuff syndrome and displacement of cervical discs at C4-5 and C5-6. It paid benefits, including an April 28, 2010 right shoulder arthroscopy.

On June 29, 2011 appellant filed a Form CA-7 claim for a schedule award. In a March 7, 2011 report, Dr. Bernard R. Bach, Jr., a Board-certified orthopedic surgeon, opined that appellant had 19 percent impairment of the right arm due to loss of range of motion and weakness under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He noted that he was more comfortable using the fifth edition than the sixth edition.

In a June 22, 2011 report, Dr. Edward J. Goldberg, a Board-certified orthopedic surgeon, opined that appellant had 25 percent cervical spine whole person impairment under the fifth edition of the A.M.A., *Guides*. He noted that the impairment rating was in addition to the impairment rating of the right shoulder and upper extremity, as performed by Dr. Bach. In an August 8, 2011 report, Dr. Goldberg opined that appellant reached maximum medical improvement for his cervical condition. Under the sixth edition of the A.M.A., *Guides*, he opined that appellant had 24 percent impairment of the cervical spine.

In an October 6, 2011 report, Dr. Christopher R. Brigham, an OWCP medical adviser, reviewed the medical evidence of record, including the reports of Dr. Goldberg and Dr. Bach. He opined that appellant had reached maximum medical improvement on March 7, 2011, the date of Dr. Bach's evaluation. Dr. Brigham found that the reports of Dr. Bach and Dr. Goldberg were not in conformance with the sixth edition of the A.M.A., *Guides*. He applied the sixth edition of the A.M.A., *Guides* to the examination findings of the physicians and rated 12 percent impairment of the right upper extremity related to the shoulder injury and zero percent (no) impairment as a result of the accepted cervical conditions. Calculations and tables used under the A.M.A., *Guides* were provided.

By decision dated April 18, 2012, OWCP granted appellant a schedule award for 12 percent impairment of the right arm due to his accepted shoulder condition. The weight of medical opinion was accorded to Dr. Brigham, who applied the sixth edition of the A.M.A., *Guides* to the impairment evaluations of appellant's treating physicians.

On April 10, 2013 appellant requested reconsideration, stating that the sole purpose of his request was based on the denial of any impairment due to his accepted cervical condition. He disagreed with OWCP's review of the medical evidence and requested that an award be made based on the impairment rating by Dr. Pye of five percent to the right arm and four percent to the left arm. Appellant also submitted medical reports and diagnostic testing previously of record.

In an April 5, 2013 report, Dr. Pye reviewed the history of injury and medical record and presented findings on examination. He noted bilateral peripheral nerve damage of the median and radial nerves. Dr. Pye indicated that there was decreased sensation in both the median and

radial distribution over the right upper extremity and a decreased distribution in the median nerve distribution over the left upper extremity. He opined that appellant reached maximum medical improvement from his accepted right shoulder and cervical spine conditions and that an impairment rating under the sixth edition of the A.M.A., *Guides* was appropriate. Dr. Pye advised that the impairment rating was appended. The record, however, is devoid of the appended impairment rating from Dr. Pye.

By decision dated July 8, 2013, OWCP denied modification of its prior decision. It found Dr. Pye's medical report was irrelevant because he did not provide any physical findings related to appellant's impairment or provide permanent impairment calculations based on the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.² Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.³ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.⁴

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁵ OWCP procedures provide that to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁶

ANALYSIS

OWCP accepted the conditions of right shoulder rotator cuff syndrome and displacement of cervical discs at C4-5 and C5-6 due to the work incident of July 2, 2008. Appellant received a

² 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

³ A. George Lampo, 45 ECAB 441 (1994).

⁴ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁵ Tammy L. Meehan, 53 ECAB 229 (2001).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

schedule award for 12 percent impairment to his right arm due to his accepted shoulder condition. OWCP found no permanent impairment based on his cervical condition.⁷

Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, spine or the body as a whole.⁸ A schedule award is permissible where the employment-related spinal condition affects the upper or lower extremities.⁹ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures note that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) is to be applied.¹⁰

The evidence of record does not contain any medical opinion regarding impairment due to the accepted cervical condition. Appellant submitted evidence previously of record with an April 5, 2013 medical report from Dr. Pye. The Board notes that the medical evidence of record was reviewed and found insufficient to establish permanent impairment based on the L4-5 or C5-6 cervical disc conditions.

In an April 5, 2013 report, Dr. Pye stated that appellant had bilateral peripheral nerve damage from the cervical spinal injury and that an impairment rating under the sixth edition of the A.M.A., *Guides* was appropriate. He also noted that maximum medical improvement had been reached. Dr. Pye found decreased sensation in both the median and radial distribution over the right upper extremity and a decreased distribution in the median nerve distribution over the left upper extremity, but his report lacks sufficient detail for an impairment rating to be performed. He noted that an impairment rating was attached, but there is no such rating of record. Appellant did not submit any other medical evidence which addressed the extent of permanent impairment causally related to his accepted cervical condition. The record lacks a probative rating pursuant to the A.M.A., *Guides*. Thus, there is no medical evidence which demonstrates that the accepted cervical condition caused a permanent impairment.

On appeal appellant contends that the evidence submitted on reconsideration was not mentioned or considered. He further contends that Dr. Pye's report set forth a nine percent bilateral impairment to the upper extremities due to his cervical injury. As noted, the evidence submitted on reconsideration does not contain the addendum from Dr. Pye. It is appellant's burden to establish that he sustained a permanent impairment as a result of the employment

⁷ As appellant has not disagreed with the impairment awarded as a result of his accepted right shoulder condition, it will not be addressed.

⁸ See Jay K. Tomokiyo, 51 ECAB 361 (2000).

⁹ *Supra* note 8 at Chapter 2.808.

¹⁰ See G.N., Docket No. 10-850 (issued November 12, 2010); see also *supra* note 8 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

injury.¹¹ There is no medical evidence which establishes that the accepted cervical condition caused permanent impairment to his arms. OWCP properly denied his schedule award claim.

The medical evidence does not establish that appellant has permanent impairment to his arms causally related to his accepted cervical condition. Consequently, he has not established entitlement to a schedule award based on the accepted cervical condition.

Appellant may request a schedule award or an increased schedule award based on evidence of a new exposure or medical evidence showing a 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 permanent impairment based on the accepted cervical condition.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹¹ See *Tammy L. Meehan*, *supra* note 5; B.A., Docket No. 12-1135 (issued November 20, 2012).