United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Colorado Springs, CO, Employer	)	**Docket No. 14-591** **Issued: June 11, 2014**

Appearances:
Richard Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 16, 2014 appellant, through her representative, filed a timely appeal from the October 16 and 22, 2013 merit decisions 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 merits of the schedule award decision.

ISSUE

The issue is whether appellant whether established permanent impairment due to her accepted left shoulder and right knee conditions.

On appeal, appellant's representative asserts that appellant is entitled to schedule awards for the accepted left shoulder and right knee conditions and that OWCP failed to adequately examine the medical evidence in three combined files.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 10, 2004 OWCP accepted that appellant, then a 49-year-old transportation security screener, sustained employment-related bilateral carpal tunnel syndrome. The claim was adjudicated by OWCP under claim file number xxxxxx284. On August 26 and October 21, 2004 appellant underwent left and right carpal tunnel releases, respectively. She returned to modified duty.

On April 20, 2007 appellant filed a traumatic injury claim, alleging that on April 19, 2007 she injured her left arm and shoulder while lifting luggage. The claim was adjudicated under claim file number xxxxxx898.[2] Appellant began limited duty and was placed on the periodic compensation rolls when the employing establishment had no work available within her restrictions. OWCP accepted left shoulder impingement syndrome and left shoulder sprain. A September 21, 2007 magnetic resonance imaging (MRI) scan of the left shoulder demonstrated a rotator cuff tear that was not considered full thickness. Appellant accepted a permanent modified position on December 3, 2008.

On January 24, 2009 appellant filed an occupational disease claim, alleging that her job duties caused significant lower extremity pain and swelling. She stopped work on January 19, 2009. The claim was adjudicated under file number xxxxxx453 and was accepted for a right knee meniscus tear. On May 20, 2009 Dr. John H. Pak, a Board-certified orthopedic surgeon, performed right knee arthroscopy to repair a partial medial meniscal tear. The claim files were combined with file number xxxxxx284 as the master file. Appellant received compensation and resigned in July 2009 when her husband was transferred to Delaware.

On September 6, 2012 appellant filed a schedule award claim. In a July 23, 2012 report, Dr. David Weiss, an osteopath, advised that, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] she had eight percent impairment of each upper extremity due to entrapment neuropathy. Under Table 15-5, Shoulder Regional Grid, appellant had a class 1 full-thickness rotator cuff tear with residual loss for a default impairment of five percent. Dr. Weiss applied the net adjustment formula, finding a modifier of three for Functional History (GMFH), a grade modifier of one for Physical Examination (GMPE) and a grade modifier of two for Clinical Studies (GMCS), for a net adjustment of one, for a total six percent upper extremity impairment due to the accepted left shoulder condition. He also found that, under Table 16-3, Knee Regional Grid, a right partial medial meniscectomy yielded a default two percent impairment. Dr. Weiss then applied the net adjustment formula, finding modifiers of two each for functional history, physical examination and clinical studies, for a net adjustment of three, yielding a right lower extremity impairment of three percent.

On October 22, 2012 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the statement of accepted facts and medical record. He stated

[2] At the time of the 2004 occupational disease claim, appellant worked at Orlando International Airport in Orlando, Florida. She relocated to Colorado and began work at the Colorado Springs Airport.

[3] A.M.A., *Guides* (6th ed. 2008).

that Dr. Weiss erred in assigning an impairment rating for a full-thickness rotator cuff tear when the MRI scan findings demonstrated no evidence of a full-thickness tear. Dr. Berman advised that appellant should be rated upon impingement syndrome which, under Table 15-5, yielded a default value of one percent. He applied the net adjustment formula, finding grade modifiers of one each for functional history, physical examination and clinical studies, which resulted in a net adjustment of zero, for a final impairment of one percent due to the accepted left shoulder conditions.

In a February 17, 2013 report, Dr. Berman advised that he agreed with the rating by Dr. Weiss that appellant had eight percent impairment to each upper extremity. He stated that since a left shoulder strain was not an accepted condition, appellant was not entitled to a schedule award for this condition. Dr. Berman stated that the date of maximum medical improvement was July 23, 2012, the date of Dr. Weiss' examination.

By decision dated February 27, 2013, appellant was granted a schedule award for an eight percent impairment of both the right and left upper extremities. The awards ran from July 23, 2012 to July 7, 2013. The decision noted that the ratings were based on the medical findings of Dr. Weiss and Dr. Berman.

On March 7, 2013 appellant, through her representative, requested a hearing that was held on June 11, 2013. Her representative did not disagree with the schedule award for carpal tunnel syndrome but noted that Dr. Weiss also provided impairment ratings for appellant's left shoulder and right knee conditions. Although these conditions were accepted under separate claim numbers, the claims had been combined. The representative requested that the case be remanded for development on whether appellant was entitled to schedule awards for the accepted left shoulder and right knee conditions.

In a July 31, 2013 decision, an OWCP hearing representative affirmed the February 27, 2013 decision with regards to appellant's impairment due to the accepted bilateral carpal tunnel syndrome condition. Upon return of the case record, OWCP was directed to determine if appellant was entitled to schedule awards for the left shoulder impingement syndrome, left shoulder sprain or right knee meniscus tear.

In correspondence to appellant dated September 18, 2013, OWCP noted that a medial meniscus tear had been accepted and asked her to provide a medical report, in accordance with the A.M.A., *Guides* that addressed this impairment.

On September 18, 2013 OWCP asked Dr. Berman to address whether appellant was entitled to an increased schedule award due to the accepted shoulder condition. In an October 15, 2013 report, Dr. Berman noted his review of the medical record and referenced his February 17, 2013 report. He concluded that appellant would not be entitled to an increased schedule award due to the left shoulder condition.

In a decision dated October 16, 2013, OWCP found the weight of the evidence rested with the opinion of its medical adviser, who found that appellant did not have a greater impairment of her left arm. In an October 22, 2013 decision, it found that, as appellant had not

responded to the September 18, 2013 letter requesting medical evidence, she was not entitled to a schedule award for the accepted right knee meniscus tear.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing federal regulations[5] 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 the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.[7] For decisions issued after May 1, 2009, the sixth edition is to be used.[8]

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).[9] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[10] The sixth edition of the A.M.A., *Guides* also provides that, under certain circumstances, range of motion may be selected as an alternative approach in rating impairment. An impairment rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.[11] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[12] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] Under Chapter

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

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

[9] A.M.A., *Guides*, *supra* note 3 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[10] *Id*. at 385-419.

[11] *Id*. at 390. The A.M.A., *Guides* explains that diagnoses in the grid that may be rated using range of motion are followed by an asterisk.

[12] *Id*. at 494-531.

[13] *Id*. at 521.

2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[14]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[15] In determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[16]

ANALYSIS

The Board finds this case is not in posture for decision regarding whether appellant is entitled to schedule awards for the accepted conditions of left shoulder impingement syndrome and left shoulder sprain, adjudicated under claim file number xxxxxx898 or right knee meniscus tear, adjudicated under claim file number xxxxxx453. Appellant's representative noted at the June 11, 2013 hearing, that he did not disagree with the schedule award rating for her bilateral carpal tunnel syndrome.

Regarding the accepted left shoulder condition, Dr. Weiss advised that appellant had six percent impairment based on a full-thickness rotator cuff tear. As noted by Dr. Berman, the medical evidence does not support that appellant sustained a full-thickness tear. The September 21, 2007 MRI scan noted that the rotator cuff tear found was not considered full thickness. Thus, Dr. Weiss' report is insufficient to establish entitlement to an additional schedule award of six percent due to the accepted left shoulder condition. Dr. Berman submitted three reports in which he addressed appellant's left shoulder. In an October 22, 2012 report, he indicated that her shoulder should be rated under Table 15-5 for a diagnosis of impingement syndrome which yielded one percent impairment. In his February 17, 2013 report, OWCP's medical adviser indicated that, since a left shoulder strain was not accepted, appellant was not entitled to a schedule award for this condition. On October 15, 2013 he indicated that he had reviewed his February 17, 2013 report and appellant was not entitled to an increased award due to the left shoulder condition.

In the October 16, 2013 decision, OWCP found the weight of the medical evidence rested with the opinion of its medical adviser regarding the impairment to appellant's left shoulder. Dr. Berman did not acknowledge that a left shoulder condition was accepted under claim file number xxxxxx898. His reports are contradictory but indicate greater impairment due to impingement. The Board finds the case is not in posture for decision. The case will be remanded to OWCP to develop the medical record on appellant's left shoulder impingement and left shoulder sprain adjudicated under claim file number xxxxxx898.

[14] *Id*. at 23-28.

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[16] *Peter C. Belkind*, 56 ECAB 580 (2005).

The Board will also remand the case with regard to appellant's right leg impairment. In a July 23, 2012 report, Dr. Weiss found that, under Table 16-3, a partial medial meniscectomy yielded a default two percent impairment. He applied the net adjustment formula, finding a grade modifier of two each for functional history, physical examination and clinical studies, for a net adjustment of three, yielding a right lower extremity impairment of three percent. Dr. Pak noted on the May 20, 2009 operative report that a partial medial meniscectomy was performed. In the October 22, 2013 decision, OWCP denied appellant's claim finding that the record did not contain a medical report regarding her right knee. Dr. Weiss, however, clearly provided an impairment rating for her right knee condition. OWCP did not ask Dr. Berman or another OWCP medical adviser to review the record with regard to the impairment to appellant's right knee.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. The case will be remanded to OWCP for further development on the extent of impairment based on the accepted left shoulder and right knee conditions. On remand OWCP should prepare a statement of accepted facts that includes the three combined cases and their accepted conditions. Such further development as deemed necessary, OWCP shall issue an appropriate merit decision on the issue of appellant's entitlement to schedule awards for the accepted left shoulder and right knee conditions.[17]

CONCLUSION

The Board finds this case is not in posture for decision regarding the degree of appellant's left upper extremity and right lower extremity impairments.

[17] *See M.D.*, Docket No. 13-503 (issued September 19, 2013).

ORDER

IT IS HEREBY ORDERED THAT the October 22 and 16, 2013 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: June 11, 2014
Washington, DC

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

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

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