United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 14-334**
	)	**Issued: May 6, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Quakertown, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2013 appellant, through counsel, filed a timely appeal from an October 21, 2013 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 merits of this case.

ISSUE

The issue is whether appellant has more than a four percent permanent impairment to each upper extremity.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated June 21, 2013, the Board remanded the case with respect to the schedule award issue.[2] The Board noted that the

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 13-562 (issued June 21, 2013).

attending physician, Dr. Emmanuel Jacob, a Board-certified physiatrist, had provided reports dated July 27 and October 18, 2012 that were of diminished probative value with respect to the degree of permanent impairment in the arms. Dr. Jacob had applied Table 15-20, a table for impairments based on a brachial plexus injury and there was no evidence of a brachial plexus injury in this case.[3] In addition, Dr. Jacob had based his impairment rating in part on motor deficit, but under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, motor deficits are based on manual muscle testing that had not been performed. It was noted that the second opinion physician, Dr. Robert Draper, a Board-certified orthopedic surgeon, had not found a motor deficit in his September 26, 2011 report.

The Board indicated that impairments to the upper extremities due to peripheral nerve impairments from spinal injuries are determined by *The Guides Newsletter*. An OWCP medical adviser, Dr. Arnold Berman, a Board-certified orthopedic surgeon, found that appellant had a four percent impairment to each upper extremity based on *The Guides Newsletter*. The case was remanded to OWCP for clarification regarding the impairment rating. The Board noted that Dr. Jacobs had found a grade modifier two for functional history and one for clinical studies, which would result in a grade D impairment, whereas the medical adviser had applied a grade C impairment for each of the spinal nerves affected.

OWCP referred the case to Dr. Berman, OWCP's medical adviser, for an additional report. In a report dated October 21, 2013, the medical adviser stated that there was a disagreement between Dr. Jacobs and Dr. Draper as to a motor deficit. According to the medical adviser, Dr. Draper was the weight of the evidence since he was a Board-certified orthopedic surgeon, unlike Dr. Jacobs. It was noted that Dr. Jacobs found grade modifier two for functional history and one for clinical studies, and the *Quick*DASH score was consistent with grade modifier two. The medical adviser stated, "However, if Dr. Draper's examination is applied for the calculation, the functional history DASH score the ultimate result is grade modifier [one]. Therefore, in my opinion based upon the functional history, this claimant has a grade modifier [one], and the clinical studios have a grade modifier." The medical adviser concluded therefore that the impairment for each upper extremity remained at four percent, as each of the spinal nerves C5-8 had a one percent impairment for grade C.

By decision dated October 21, 2013, OWCP determined that appellant was not entitled to an additional schedule for impairment to the arms based on the medical evidence of record.

LEGAL PRECEDENT

Section 8107 of 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.[4] 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

[3] The accepted condition was aggravation of cervical degenerative disc disease.

[4] 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).

adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[6]

For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment using the sixth edition" (July/August 2009) is to be applied.[7] The default impairment (grade C) for the class of diagnosis (CDX) may be modified pursuant to Functional History (GMFH) as discussed in Table 15-7 and Clinical Studies (GMCS) Table 15-9.[8] The adjustment formula is GMFH-CDX + GMCS-CDX.[9]

ANALYSIS

In the present case, the Board addressed the medical evidence with respect to permanent impairment in the prior appeal. The remand of the case was to clarify the application of *The Guides Newsletter*. OWCP's medical adviser, Dr. Berman, had found, under the Proposed Table 1, one percent for each spinal nerve C5, C6, C7 and C8 based on mild sensory deficit. This was based on the default grade C impairment for each identified nerve. A proper application of the table required an assessment of whether the default grade C should be modified based on grade modifiers for functional history and clinical studies.

As to clinical studies, Dr. Berman noted that Dr. Jacobs used a grade modifier of one and Dr. Berman also opined that a grade modifier of one was appropriate. With respect to functional history, however, he noted that Dr. Jacobs found a grade modifier of two. Dr. Berman appears to reject Dr. Jacob's findings on two grounds: (1) Dr. Jacobs was a physiatrist, not an orthopedic surgeon, and (2) he calculated his impairment rating using a motor deficit. He does not explain why either of these grounds are an appropriate basis to disregard the findings of Dr. Jacobs as to functional history. Dr. Berman does not explain why a physiatrist could not provide probative examination results or opinion as to functional history. As to motor deficit, the Board noted in its prior opinion that an impairment based on a motor deficit had not been established by Dr. Jacobs. The grade modifier for functional history, as discussed under Table 15-7, does not require a finding of motor deficit based on manual muscle testing. The relevant information on functional history is pain or symptoms with activity, ability to perform self-care activities, and the score on a *Quick*DASH functional assessment.[10]

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[5] *A. George Lampo*, 45 ECAB 441 (1994).

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

[7] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[8] Under *The Guides Newsletter*, the CDX is one, and the impairment calculation under is based on sensory and motor deficit.

[9] A.M.A., *Guides* 411. The Board notes that a physical examination grade modifier Physical Examination (GMPE) is not used in the calculation, as physical examination is used in placement of the diagnosis. *See The Guides Newsletter*.

[10] A.M.A., *Guides* 406, Table 15-7. The *Quick*DASH is a functional assessment questionnaire that is a shortened version of the disabilities of the arm, shoulder and hand. *See* A.M.A., *Guides* 482.

In addition, the medical adviser does not explain why the findings of second opinion physician Dr. Draper would establish a grade modifier one for functional history. Dr. Draper did not discuss self-care activities, or provide a functional assessment using *Quick*DASH. On the other hand, in the July 27, 2012 report, Dr. Jacobs discussed activities of daily living and referred to results of a *Quick*DASH functional assessment.

The opinion by Dr. Berman that Dr. Draper's report should be considered on this issue, and that application of Dr. Draper's findings resulted in a grade modifier one for functional history under Table 15-7, was not accompanied by adequate explanation. The case will be remanded for a proper assessment of the evidence and a clear explanation as to findings with respect to a functional history grade modifier under the A.M.A., *Guides.* After such further development as necessary, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 6, 2014
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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