United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket No. 10-1619**
	)	**Issued: April 13, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Upper Black Eddy, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 2, 2010 appellant, through her attorney, filed a timely appeal from a February 5, 2010 merit decision of the Office of Workers' Compensation Programs denying her claim for an increased schedule award. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a 19 percent permanent impairment of the right upper extremity.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated January 23, 2004, the Board affirmed November 12, 2002 and February 19, 2003 decisions finding that appellant did

[1] 5 U.S.C. § 8101 *et seq.*

not establish an employment-related recurrence of disability from January 8 to April 9, 2001.[2] The facts and the circumstances surrounding the prior appeal are hereby incorporated by reference.

By decision dated July 9, 1996, the Office granted appellant a schedule award for a 19 percent permanent impairment of the right upper extremity. The period of the award ran for 59.28 weeks from May 20, 1996 to July 8, 1997.

In an impairment evaluation dated December 13, 2007, Dr. Nicholas Diamond, an osteopath, diagnosed right shoulder impingement syndrome, radiculitis of the cervical spine, a strain and sprain of the cervical spine with myofascitis, status post acromioplasty and Mumford procedure and right upper trunk brachial plexus neuropathy. He measured range of motion of the right shoulder of 95 degrees forward elevation, 90 degrees abduction, 55 degrees adduction, 55 degrees internal rotation and 90 degrees external rotation. Dr. Diamond found full range of motion of the right elbow and some thenar atrophy of the right hand. He measured grip strength of the hand as 14.25 kilograms on the right and 10.50 kilograms on the left. Dr. Diamond found a sensory deficit at C6, C7 and C8 with a loss of muscle strength in the supraspinatus and deltoid muscles. On examination of the right shoulder, he noted tenderness of the acromioclavicular (AC) and rotator cuff with a positive Hawkins' impingement sign, drop test, O'Brien test , Adson test and infraclavicular and supraclavicular Tinel's sign. Dr. Diamond applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), and determined that appellant had a 10 percent right shoulder impairment due to a resection arthroplasty, a 5 percent impairment for loss of flexion, a 4 percent impairment for loss of abduction, and a 2 percent impairment for loss of internal rotation. He further found that she had a four percent impairment of the right upper extremity due to a sensory deficit of the C6, C7 and C8 nerve root. Dr. Diamond combined his impairment findings and concluded that appellant had a total right upper extremity impairment of 31 percent.

On September 20, 2008 an Office medical adviser reviewed the evidence and opined that appellant had an 11 percent impairment of the right upper extremity due to loss of range of motion of the right shoulder.

By decision dated December 11, 2008, the Office denied appellant's claim for an increased schedule award. It found that the medical evidence did not establish that she had right arm impairment greater than the 19 percent previously awarded.

On December 16, 2008 appellant, through her attorney, requested an oral hearing. Following a preliminary review, on March 18, 2009 an Office hearing representative set aside the December 11, 2008 decision. He found that the Office medical adviser properly excluded Dr. Diamond's rating for appellant's cervical condition as it was not an accepted condition and

[2] Docket No. 03-2114 (issued January 23, 2004). On September 25, 1992 appellant, then a 46-year-old rural carrier, filed an occupational disease claim alleging fibromyositis due to repetitive shoulder movements while casing mail. She was last exposed to the conditions alleged to have caused her condition on September 17, 1992. The Office accepted appellant's claim for impingement syndrome of the right shoulder and authorized an arthroscopic acromioplasty of the right shoulder on February 11, 1993 and an open acromioplasty and distal clavical resection on February 8, 1994. Appellant worked modified duty following her injury with intermittent periods of total disability. On August 16, 2007 she elected to receive retirement benefits effective September 1, 2007.

there was no evidence that it preexisted the work injury. The hearing representative determined, however, that the Office medical adviser did not adequately explain whether she was entitled to an impairment rating due to her resection arthroplasty.

On August 27, 2009 the Office medical adviser applied the fifth edition of the A.M.A., *Guides* to Dr. Diamond's clinical findings. He found that appellant had 10 percent impairment due to loss of range of motion of the right shoulder and 11 percent impairment due to the distal clavicle resection, for a combined total right upper extremity impairment of 20 percent impairment. The Office medical adviser also evaluated the extent of her impairment using the sixth edition of the A.M.A., *Guides*. He noted that Table 15-5 on page 405 provided a choice of rating a shoulder impairment using either the shoulder regional grid or range of motion. Utilizing the shoulder regional grid set forth at Table 15-5 on page 403, the Office medical adviser found that appellant had Class 1 impairment due to AC joint disease status post distal clavicle resection, which yielded a default impairment value of 10 percent. The Office medical adviser applied a grade modifier of one for functional history, physical examination and clinical studies. Applying the net adjustment formula, the Office medical adviser concluded that appellant had a 10 percent impairment of the right upper extremity using the shoulder regional grid. The Office medical adviser next evaluated the extent of permanent impairment using range of motion. He determined that, pursuant to Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides*, 95 degrees forward flexion yielded a three percent impairment, 90 degrees adduction yielded no impairment, 55 degrees abduction yielded a three percent impairment, 55 degrees internal rotation yielded a two percent impairment and 90 degrees external rotation yielded no impairment, for a total right upper arm impairment due to loss of range of motion of eight percent. The Office medical adviser noted that appellant had the greatest impairment using the fifth edition of the A.M.A., *Guides*. He advised that the greater impairment under the sixth edition of the A.M.A., *Guides* was the 10 percent impairment using the shoulder regional grid.

By decision dated September 2, 2009, the Office denied appellant's claim for an increased schedule award. It found that, under the sixth edition of the A.M.A., *Guides*, she did not have more than the previously awarded 19 percent right upper extremity impairment.

On September 8, 2009 appellant, through her attorney, requested an oral hearing. On October 28, 2009 following a preliminary review of the record, the hearing representative set aside the September 2, 2009 decision. He determined that the Office should have based its recalculation of the schedule award on the fifth edition of the A.M.A., *Guides*. The hearing representative found that appellant was entitled to a schedule award for an additional one percent impairment under the fifth edition of the A.M.A., *Guides*.

On November 18, 2009 the hearing representative vacated the October 28, 2009 decision. He found that the Office properly used the sixth edition of the A.M.A., *Guides* as the recalculation occurred after May 1, 2009, the effective date for the Office to use the sixth edition.

A hearing was held on December 18, 2009. Appellant's attorney argued that a conflict existed between Dr. Diamond and the Office medical adviser. He also argued that she had preexisting or contemporaneous problems with her neck and thus any cervical impairment should be included in the award.

By decision dated February 5, 2010, the hearing representative affirmed the September 2, 2009 decision. He found that the evidence did not show a greater impairment than the 19 percent previously awarded. The hearing representative additionally determined that there was no evidence that appellant had a preexisting neck condition.

On appeal appellant's attorney reiterates that a conflict exists between the Office medical adviser and Dr. Diamond. He further maintains that the Office erred in failing to include her preexisting cervical condition. Counsel noted that Dr. Scott M. Fried, an attending osteopath, found brachial plexus involvement and cervical radiculopathy by electromyogram (EMG).

LEGAL PRECEDENT

The schedule award provision of the Act,[3] and its implementing federal regulations,[4] 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, the Act 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, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

The sixth edition requires identifying 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).[7] The net adjustment formula is (GMFH-CDX) + (GMPE-DCX) + (GMCS-CDX).

ANALYSIS

The Office accepted that appellant sustained right shoulder impingement syndrome due to factors of her federal employment. On July 9, 1996 it granted her a schedule award for a 19 percent permanent impairment of the right upper extremity.

In a December 13, 2007 impairment evaluation, Dr. Diamond measured range of motion for the right shoulder and found tenderness of the AC joint and rotator cuff. He further found crepitus and a positive impingement sign and Tinel's sign, drop test, O'Brien test and Adson test. Dr. Diamond found decreased manual muscle strength of the supraspinatus and deltoid muscles. Citing the fifth edition of the A.M.A., *Guides*, he concluded that appellant had 10 percent impairment for a resection arthoplasty, and 11 percent impairment due to loss of right shoulder

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] 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).

[7] A.M.A., *Guides* 494-531.

range of motion in flexion, abduction and internal rotation, for a combined upper extremity impairment of 20 percent. Dr. Diamond further determined that appellant had impairment due to a sensory deficit of the right C6, C7 and C8 nerve roots. An Office medical adviser concurred that appellant had an 11 percent impairment due to loss of range of motion; however, by decision dated March 18, 2009 an Office hearing representative remanded the case for the Office medical adviser to consider whether appellant had an additional impairment due to her resection arthroplasty. He found that the Office medical adviser properly excluded Dr. Diamond's impairment due to a sensory deficit as there was no evidence that a cervical condition preexisted the employment injury.

On August 27, 2009 an Office medical adviser found that, utilizing the fifth edition of the A.M.A., *Guides*, appellant had a 20 percent right upper extremity resulting from loss of range of motion and the resection arthroplasty. He also evaluated her impairment using the sixth edition of the A.M.A., *Guides*. Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*. Further, any recalculations of awards that result from hearing or reconsiderations decisions should be based on the sixth edition of the A.M.A., *Guides*.[8] Consequently, the Office properly utilized the Office medical adviser's impairment rating under the sixth edition of the A.M.A., *Guides* as the basis for its schedule award.

The Office medical adviser noted that Table 15-5 sets forth both a diagnosis-based evaluation method for right shoulder conditions and a provision to assess the impairment using loss of range of motion.[9] The impairment due to loss of range of motion stands alone and is not combined with the diagnosis-based impairment.[10] Using the diagnosis-based evaluation, the Office medical adviser found that appellant had a Class I impairment due to AC joint disease status post distal clavicle resection, which yielded a default value of 10.[11] He adjusted the impairment value using grade modifiers of one for functional history, physical examination and clinical findings.[12] Applying the net adjustment formula described above, the Office medical adviser found a Grade C, or 10 percent impairment.[13]

Using range of motion, the alternative method for determining the extent of impairment, the Office medical adviser found that 95 degrees forward flexion yielded a three percent impairment, 90 degrees adduction yielded no impairment, 55 degrees abduction yielded a three percent impairment, 55 degrees internal rotation yielded a two percent impairment and 90 degrees external rotation yielded no impairment, which he added to find an eight percent total

[8] *See C.K.*, Docket No. 09-2371 (issued August 18, 2010).

[9] A.M.A., *Guides* 403, 405, Table 15-5.

[10] *Id*. at 405, Table 15-5; *C.K.*, *supra* note 8.

[11] *Id*. at 403, Table 15-5.

[12] *Id*. at 406-409.

[13] Applying the net adjustment formula would yield (1-1) + (1-1) + (1-1) = 0, for a Grade C, or 10 percent impairment.

impairment due to loss of range of motion for the right arm.[14] According to Table 5-34, however, 55 degrees of abduction yields a six rather than a three percent permanent impairment. Appellant, consequently, has an 11 percent permanent right upper extremity impairment due to loss of range of motion using the sixth edition of the A.M.A., *Guides*. As noted, the impairment due to loss of range of motion stands alone and is not combined with the impairment found using the diagnosis-based regional grid.[15]

The Office properly denied appellant's claim for an increased schedule award as there was no evidence that she had more than the previously awarded 19 percent permanent impairment of the right upper extremity pursuant to the sixth edition of the A.M.A., *Guides*. On appeal appellant's attorney contends that a conflict exists between Dr. Diamond and the Office medical adviser. Dr. Diamond, however, evaluated her impairment using the fifth edition of the A.M.A., *Guides*, which is no longer in use. A medical opinion not based on the appropriate edition of the A.M.A., *Guides* is of diminished probative value in determining the extent of a claimant's permanent impairment.[16]

Appellant's attorney further contends that the Office erred in failing to include the impairment to her right upper extremity resulting from her cervical impairment. He argues that an EMG study performed by Dr. Friedman shows that the cervical condition preexisted her employment injury. It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included.[17] There is no evidence, however, that appellant had a cervical condition prior to her September 1992 work injury.[18] Dr. Friedman's EMG study was performed on November 12, 2001, and does not establish that appellant had a preexisting cervical condition.

CONCLUSION

The Board finds that appellant has no more than a 19 percent permanent impairment of the right upper extremity.

[14] *Id*. at 475, Table 15-34.

[15] *Id*. at 405, Table 15-5; *C.K.*, *supra* note 8.

[16] *Fritz A. Klein*, 53 ECAB 642(2002).

[17] *See Clary J. Cleary*, 57 ECAB 563 (2006); *Mike E. Reid*, 51 ECAB 543 (2000).

[18] Appellant was last exposed to the conditions alleged to have caused her injury on September 17, 1992. Following that time she performed modified employment. The Board has held that where an injury is sustained over a period of time, the date of injury is the date of last exposure to the employment factors causing the injury. *See Manuel Carbajal*, 37 ECAB 216 (1985).

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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