United States Department of Labor
Employees' Compensation Appeals Board

P.V., Appellant	)	
and	)	**Docket No. 09-1852**
	)	**Issued: June 24, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Pittsburgh, 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:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 13, 2009 appellant, through counsel, timely appealed the July 8, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than two percent impairment of the left arm, for which he received a schedule award.

FACTUAL HISTORY

Appellant, a 41-year-old civil aviation security specialist (Federal Air Marshal), has an accepted traumatic injury claim for left rotator cuff sprain, which occurred on November 18, 2002.[1] On May 22, 2003, he underwent left shoulder arthroscopic surgery. The

[1] Appellant was injured while participating in defensive tactics and close quarters combat training.

postoperative diagnoses included subacromial impingement, articular-sided partial-thickness rotator cuff tear and posterior labral tear. Surgery was authorized by the Office.

On January 29, 2009, appellant filed a claim for a schedule award. In a January 15, 2009 report, Dr. Michael J. Platto, a Board-certified physiatrist, diagnosed left rotator cuff sprain/tear, status post arthroscopic repair in May 2003. Dr. Platto explained that appellant had residual range of motion deficits of the shoulder. He rated 9 percent impairment of the left upper extremity due to loss of motion.

In a report dated April 5, 2009, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical adviser, concurred that appellant had 9 percent left arm impairment.[2]

The record reflects that counsel for appellant inquired as to when a schedule award would issue. In a May 11, 2009 letter, the Office advised counsel that the medical evidence to date was developed with regard to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001); however, the sixth edition had been published in 2008 and was made applicable effective May 1, 2009 for evaluating impairment in claims before the Office. Counsel was asked to submit further medical evidence from Dr. Platto utilizing the sixth edition in rating appellant's permanent impairment.

In a May 28, 2009 report, Dr. Platto explained that appellant's impairment rating was based on a diagnosis of partial-thickness tear of the rotator cuff, which represented a Class 1 impairment based on a history of painful injury. The default grade, C, for the class of diagnosis (CDX) was one percent impairment of the upper extremity. Dr. Platto advised that appellant scored 47 on the *Quick*DASH (Disabilities of the Arm, Shoulder and Hand) functional assessment tool, which represented a grade 2 modifier (Grade Modifier for Functional History - GMFH). He also found a grade 2 modifier based on appellant's physical examination findings (Grade Modifier for Physical Examination - GMPE).[3] Dr. Platto noted that, in order to determine the final impairment under the sixth edition, he applied the Net Adjustment Formula (NAF): GMFH (2) minus CDX (1) plus GMPE (2) minus CDX (1). Based on the formula, the net adjustment modifier was 2. Dr. Platto further explained that the plus 2 net adjustment modifier allowed for adjustment from grade C, the default, to grade E, which represented two percent impairment of the upper extremity. On June 27, 2009, Dr. Berman agreed with the two percent left upper extremity impairment rating.

In a July 8, 2009 decision, the Office granted a schedule award for two percent impairment of the left upper extremity. The award covered a period of 6.24 weeks beginning May 28, 2009.

[2] On March 15, 2009, the Director issued FECA Bulletin No. 09-03 advising that the sixth edition of the *Guides* would be made applicable to rating impairment effective May 1, 2009.

[3] He justified the GMPE adjustment based on left shoulder "history of acute trauma, consistent relationship of symptoms with activity and ROM, reproducible symptoms with stability testing, and a demonstrable etiologic anatomic lesion." Dr. Platto also noted that the left side ROM was "moderately decreased," compared to the right side, which was not involved in the injury.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[4] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[5] Effective May 1, 2009, schedule awards are determined in accordance with the A.M.A., *Guides* (6th ed. 2008).[6]

ANALYSIS

Appellant's claim was accepted by the Office for a left rotator cuff tear for which he underwent surgery on May 23, 2003 for repair of a partial-thickness tear. On January 29, 2009, he filed a claim for a schedule award. The Board finds that the medical evidence of record establishes two percent impairment to appellant's left arm.

Under the 6th edition of the A.M.A., *Guides*, impairments of the upper extremities are covered by Chapter 15. Section 15-2, entitled *Diagnosis-Based Impairment*, indicates that "Diagnosis-based impairment is the primary method of evaluation of the upper limb."[7] The initial step in the evaluation process is to identify the impairment class by using the corresponding diagnosis-based regional grid. Dr. Platto utilized the "Shoulder Regional Grid," Table 15-5, A.M.A., *Guides* 402, and identified a Class 1 impairment based on "rotator cuff injury, partial-thickness tear." He noted that appellant had a history of painful injury warranting a Class 1 designation. Once the impairment class was determined based on the diagnosis, the grade was initially assigned the default value, "C." Under Table 15-5, the default grade, C, for a Class 1 partial-thickness tear represents one percent upper extremity impairment.[8]

After determining the impairment class and default grade, Dr. Platto determined whether there were any applicable grade adjustments for so-called "non-key" factors or modifiers. These include adjustments for functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS). The grade modifiers are used in the Net Adjustment Formula to calculate a net

[4] For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2006).

[5] 20 C.F.R. § 10.404 (2009).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

[7] Section 15.2, A.M.A., *Guides* 387.

[8] The grades range from A to E, with A representing zero (0) percent upper extremity impairment, B and C representing one (1) percent, and D and E representing two (2) percent upper extremity impairment. Table 15-5, A.M.A., *Guides* 402.

adjustment.[9] The final impairment grade is determined by adjusting the grade up or down from the default value C by the calculated net adjustment. Dr. Platto identified two modifiers; one based on the functional history (GMFH) and the other based on physical examination (GMPE). For the functional history, Dr. Platto assigned a grade modifier 2 based on appellant *Quick*DASH score of 47.[10] He also assigned a grade modifier 2 based on appellant's left shoulder physical examination findings.[11] Applying the net adjustment formula resulted in a modifier of 2, which resulted in a grade adjustment from C to E. The corresponding upper extremity impairment for a Class 1, grade E rotator cuff partial-thickness tear is two percent.[12]

The Board finds that Dr. Platto properly applied the A.M.A., *Guides* (6th ed. 2008) to rate impairment to appellant's left shoulder. Dr. Berman, the Office medical adviser, reviewed the medical evidence and agreed that appellant had two percent impairment under the formula of the sixth edition. The weight of medical evidence from the treating physician and the Office medical adviser establishes the extent of permanent impairment in this case.

On appeal, counsel contends that the Office abused its discretion by issuing a decision under the sixth edition of the *Guides* rather than the fifth edition. He noted that total impairment under the sixth edition was less than that appellant would receive for loss of range of motion under the fifth edition.

As noted, the Office issued FECA Bulletin No. 09-03 on March 15, 2009 directing claims examiners and other reviewing personnel to apply the sixth edition of the *Guides* as of May 1, 2009. The Bulletin directed that correspondence with treating physicians, consultants and second opinion specialists should reflect use of the new edition for decisions issued on or after May 1, 2009. In this case, the Office forwarded the medical evidence to the Office medical adviser on March 17, 2009. Dr. Berman completed his review of the medical record on April 5, 2009 and the claims examiner received a copy of his report on April 7, 2009. Aware of the scheduled May 1, 2009 implementation of the sixth edition of the *Guides*, counsel contacted the Office on April 29, 2009 inquiring as to when a decision would be issued. On May 11, 2009, the Office properly advised counsel that the sixth edition became effective for all final decisions issued on or after May 1, 2009 and because appellant's initial impairment rating was made under the fifth edition a new impairment rating was required.

The Board has recognized that the method used in rating impairment for purposes of a schedule award is a matter, which rests in the sound discretion of the Director. In *Harry D. Butler*,[13] the Board addressed the Office's use of the A.M.A., *Guides* to evaluate impairment since the first edition single volume published in 1971. The Director has since adopted subsequent editions of the A.M.A., *Guides* and has stated the date specific when use of each

[9] Net Adjustment = (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX). Section 15.3d, A.M.A., *Guides* 411.

[10] Table 15-7, A.M.A., *Guides* 406.

[11] Table 15-8, A.M.A., *Guides* 408.

[12] Table 15-5, A.M.A., *Guides* 402.

[13] 43 ECAB 859 (1992).

edition should be made applicable to claims under the Act. Counsel has not established that the Director abused the discretion delegated to him under section 8107 and the implementing federal regulations to make the sixth edition of the *Guides* applicable to all claimants as of May 1, 2009. The fact that the sixth edition revises the evaluation methods used in previous editions does not establish an abuse of discretion. As noted in FECA Bulletin No. 09-03, the American Medical Association periodically revises the *Guides* to incorporate current scientific clinical knowledge and judgment and to establish standardized methodologies for calculating permanent impairment.

CONCLUSION

The Board finds that appellant has two percent impairment of the left upper extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: June 24, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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