United States Department of Labor
Employees' Compensation Appeals Board

W.J., Appellant	)	
and	)	**Docket No. 09-1596**
	)	**Issued: March 5, 2010**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Jonesville, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2009 appellant filed a timely appeal from a May 1, 2009 decision of the Office of Workers' Compensation Programs' which affirmed a November 12, 2008 schedule award decision. Pursuant to 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 two percent permanent impairment of his left upper extremity for which he received a schedule award.

FACTUAL HISTORY

On January 29, 2007 appellant, then a 40-year-old camp coordinator, slipped on a wet floor and injured his left knee and left elbow while in the performance of duty.[1] She returned to

[1] The record reflects that prior to the injury of January 29, 2007; appellant underwent a surgical treatment of the left shoulder with arthroscopy and labral repair in 2003.

work on January 30, 2007. The Office accepted the claim contusion of the left elbow and forearm, shoulder, upper arm, knee and lesion of the left ulnar nerve. Appellant's treating physician, Dr. John L. Franklin, a Board-certified orthopedic surgeon, performed a left elbow ulnar nerve transposition on August 9, 2007 which was authorized by the Office. He stopped work on August 9, 2007 and returned to work on November 26, 2007. On May 14, 2008 appellant underwent a left stellate ganglion block.

On June 12, 2008 appellant completed a Form CA-7 and requested a schedule award. He submitted a June 10, 2008 report from Dr. Michael P. Feanny, an orthopedic surgeon, who diagnosed causalgia of the left upper extremity with ulnar and median nerve neuropathy and carpal tunnel syndrome. Dr. Feanny found that appellant continued to have pain, dysfunction, numbness, hypersensitivity and stiffness of his left upper extremity. He determined that appellant's grip strength was significantly diminished in the left hand as determined by dynamometer measurement. Dr. Feanny found that grip strength in his left hand of 30 kilograms as opposed to 65 kilograms on the right for a 50 percent loss of strength. He indicated that taking into consideration appellant's causalgia, the presence of chronic median and ulnar neuropathy, and weakness, appellant had a 50 percent loss of function of his left upper extremity, or a 12 percent whole body impairment of function. Dr. Feanny opined that appellant's condition was permanent.

In a July 3, 2008 report, the Office medical adviser noted that appellant had left ulnar transposition on August 9, 2007 and a follow-up electromyography scan and nerve conduction studies revealed left carpal tunnel syndrome and no evidence of radiculopathy and plexopathy. He noted that Dr. Feanny assigned an impairment value of 50 percent to the left upper extremity for causalgia; however, it was not an accepted condition and could not be rated for impairment. The Office medical adviser reviewed the follow-up studies that only showed left carpal tunnel syndrome, which was not an accepted condition, and there was no triple phase bone scan report to document causalgia. He explained that the award of 50 percent could not be valid and recommended a second opinion physician.

On August 13, 2008 the Office referred appellant, a statement of accepted facts, questions and the medical record to Dr Richard L. Glatzer, a Board-certified orthopedic surgeon.

In a report dated September 6, 2008, Dr. Glatzer reviewed appellant's history of injury and medical treatment. On examination he saw no evidence to support the diagnoses of causalgia or reflex sympathetic dystrophy. Dr. Glatzer noted that appellant's sensory abnormality was purely subjective and questionable at best, as it did not follow any discrete dermatome patterns. He advised that there was no atrophy in either hand, and he questioned the amount of disuse that appellant had to the left upper extremity. Other than a healed elbow scar, he could find "no positive objective orthopedic or neurological clinical findings to corroborate" appellant's "subjective complaints or for which to state there was any underlying organic pathology as a basis to those complaints." He suspected great functional overlay and noted that appellant's affect was "flat." In a form report dated September 4, 2008, Dr. Glatzer provided findings for the left elbow which included 136 degrees of flexion, 0 degrees of extension, 74 degrees of pronation and 84 degrees of supination. He opined that there was no additional impairment of the function of the arm due to sensory deficit, pain or loss of strength and determined that appellant had an impairment of five percent to the left upper extremity.

Dr. Glatzer also listed ranges of motion for the shoulder but indicated that this resulted in no impairment.

In a September 15, 2008 report, Dr. Glatzer advised that the ranges of motion for appellant were within normal limits. He found that appellant had no impairment to the left upper extremity, secondary to subjective decrease in range of motion.

In an October 6, 2008 report, the Office medical adviser reviewed appellant's history of injury and treatment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) hereinafter A.M.A., *Guides*. He noted that the final assessment by the second opinion physician indicated that there was only a slight loss of motion of the left elbow and a normal range of motion of the left shoulder. The Office medical adviser explained that, while Dr. Glatzer noted five percent permanent impairment, this was not correct. According to Figure 16-34, 136 degrees of lost retention was one percent impairment and 74 degrees of retention or pronation was one percent impairment.[2] The Office medical adviser noted that Dr. Glatzer did not make any other findings that would support additional impairment. He noted the findings by Dr. Glatzer for the left shoulder and referred to Figures 16-40, 16-43 and 16-46.[3] Appellant exhibited 170 degrees of forward elevation, 50 degrees of backward elevation, 170 degrees of abduction, 46 degrees of adduction, 84 degrees of internal rotation and 90 degrees external rotation. These findings did not yield any impairment. The Office medical adviser concluded that appellant had two percent impairment to the left arm. He found that appellant reached maximum medical improvement on September 4, 2008.

On November 12, 2008 the Office granted appellant a schedule award for two percent impairment of the left arm. The award covered a period of 6.24 weeks from September 4 to October 17, 2008.

By letter dated November 12, 2009, appellant, through his attorney, requested a hearing, which was held on March 25, 2009.

In a May 1, 2009 decision, the Office hearing representative affirmed the November 12, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing 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, 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 to all claimants,

[2] A.M.A., *Guides* 472.

[3] *Id.* at 476, 477, 479.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

ANALYSIS

In support of his claim for a schedule award, appellant submitted a report from Dr. Feanny dated June 10, 2008. Dr. Feanny determined that appellant had 50 percent impairment of the left arm, or 12 percent whole person impairment. However, this rating does not conform with the protocols of the A.M.A., *Guides*. The Board notes that the Act does not provide for whole person impairments and therefore the calculation of whole person impairment cannot be used to determine the extent of appellant's impairment.[7] Furthermore, Dr. Feanny did not refer to any portions of the A.M.A., *Guides* or explain how he arrived at his determination for left arm impairment. An opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment.[8] Schedule awards are to be based on the A.M.A., *Guides* and an estimate of permanent impairment is irrelevant and of diminished probative value where it is not based on the A.M.A., *Guides*.[9] The report of Dr. Feanny is therefore insufficient to establish that appellant was entitled to a schedule award greater than the two percent awarded.

The Office referred appellant for a second opinion examination with Dr. Glatzer who listed range of motion findings in a September 4, 2008 report. Dr. Glatzer opined that appellant had an impairment of five percent to the left upper extremity. However, he did not explain how this impairment rating was obtained pursuant to the A.M.A., *Guides*. Thus, Dr. Glatzer's opinion is insufficient to establish five percent impairment.

The Office then properly referred the medical record to its Office medical adviser who utilized the findings contained in Dr. Glatzer's report to rate permanent impairment.[10] The Office medical adviser explained that the range of motion measurements supported two percent impairment to the left upper extremity. The Board notes that the findings for the left elbow, according to Figure 16-34, include 136 degrees of lost retention or flexion, which yields one percent impairment and 74 degrees of retention on pronation which yields one percent impairment.[11] The Office medical adviser noted that there were no other findings to support

[6] A.M.A., *Guides* (5th ed. 2001).

[7] *See Tommy R. Martin*, 56 ECAB 273 (2005).

[8] *Carl J. Cleary* , 57 ECAB 563 (2006).

[9] *James R. Hill*, 57 ECAB 583 (2006).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified).

[11] A.M.A., *Guides* 472.

impairment. The Board notes, however, that the record reflects left shoulder impairment. According to Figure 16-40, 170 degrees of forward elevation correlates to one percent impairment and 50 degrees of backward elevation yields no impairment.[12] Referring to Figure 16-43, 170 degrees of abduction and 46 degrees of adduction also yields no impairment.[13] Under Figure 16-46, 84 degrees of internal rotation and 90 degrees external rotation do not yield any impairment. The Board notes that when the aforementioned values for the elbow and the shoulder are combined, this yields three percent impairment to the left upper extremity. The Board finds that appellant has three percent impairment of the left arm.

CONCLUSION

The Board finds that appellant has a three percent permanent impairment of his left arm.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 1, 2009 is affirmed, as modified.

Issued: March 5, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[12] *Id.* at 476.

[13] *Id.* at 477.