United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 10-1523**
	)	**Issued: April 1, 2011**
DEPARTMENT OF THEY NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2010 appellant filed a timely appeal from a March 17, 2010 merit decision of the Office of Workers' Compensation Programs regarding her schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than eight percent impairment of the right upper extremity and more than five percent impairment of the left upper extremity, for which she received schedule awards.

FACTUAL HISTORY

On June 4, 2007 appellant, then a 37-year-old composite and plastic fabricator helper, filed an occupational disease claim for pain in both wrists she alleged was due to repetitive job duties. The Office accepted the conditions of bilateral medial epicondylitis, bilateral lateral epicondylitis and right wrist fibrocartilage complex tear and paid appropriate compensation. On

April 22, 2008 appellant underwent right wrist arthroscopic debridement surgery for triangular fibrocartilage complex (TFCC) tear, which the Office authorized.[1] She has been off work since April 4, 2008.

On October 14, 2008 appellant requested a schedule award. In a January 7, 2009 report, Dr. James M.T. Garrity, an osteopath Board-certified in preventive medicine, concluded that she was at maximum medical improvement. He opined, in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (hereinafter), that appellant had 13 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity. Measurements, calculations and citations to the A.M.A., *Guides* were provided.

On April 14, 2009 appellant underwent left extensor carpi radialis brevis origin release for relief of chronic left lateral epicondylitis.

In an April 27, 2009 report, an Office medical adviser opined that Dr. Garrity's report was insufficient to rate permanent impairment. He disagreed that appellant was at maximum medical improvement and noted that Dr. Garrity's rating did not fully comply with the A.M.A., *Guides* and was based on conditions not accepted by the Office.

In a May 21, 2009 letter, the Office informed appellant of the evidence necessary to obtain a schedule award once maximum medical improvement was reached. Appellant was further informed that the sixth edition of the A.M.A., *Guides* was being used to calculate schedule awards.

In a June 15, 2009 report, Dr. Garrity noted seeing appellant for right arm complaints and to conduct a rating for the right arm. He provided his examination findings and assessed right lateral epicondylitis, right wrist TFCC tear, status post lateral release of the epicondyle and arthroscopic repair of the TFCC tear. Under the sixth edition of the A.M.A., *Guides*, Dr. Garrity opined that appellant had 13 percent arm impairment. Under Table 15-4, page 399, he advised that she had a Class 1 Grade C five percent upper extremity impairment for the lateral epicondylitis status post release. Dr. Garrity noted that appellant had ongoing problems with strength and sensation despite recent improvements. Under Table 15-3, page 396, he accorded a Class 1 Grade C or eight percent arm impairment for the TFCC tear. Dr. Garrity indicated that appellant had documented TFCC injury, underwent surgery and has residual findings as evidenced with decreased strength and reduced range of motion on examinations. Using the Combined Values Chart, he combined the 5 percent elbow and 8 percent wrist impairments for 13 percent total right arm impairment.

On August 19, 2009 an Office medical adviser reviewed the statement of accepted facts along with the medical record, including Dr. Garrity's June 15, 2009 report. He advised that he agreed with Dr. Garrity's specified diagnosis-based ratings as they were based on appellant's surgeries and that she could be considered at maximum medical improvement. The Office medical adviser noted, however, the operative reports reflected that the TFCC debridement was

[1] A right wrist magnetic resonance imaging scan as well as an arthrogram, both performed on February 11, 2008 revealed a TFCC tear

done on the right side and the lateral epicondylar release was done on the left side. Based on this, he opined that appellant had eight percent upper extremity impairment of the right side based on surgical treatment of the right wrist TFCC tear and five percent upper extremity impairment of the left side based on surgical treatment of the left extensor carpi radialis brevis origin. The Office medical adviser stated that the date of maximum medical improvement was June 15, 2009.

By decision dated December 22, 2009, the Office awarded appellant 8 percent loss of use to the right upper extremity and 5 percent loss of use to the left upper extremity, for a total 13 percent permanent impairment. The period of the award ran from October 25, 2009 to August 4, 2010, for a period of 40.56 weeks.[2]

On December 23, 2009 appellant disagreed with the Office decision and requested a review of the written record. She stated that Dr. Garrity informed her that the 13 percent impairment rating was only for her right arm. Appellant submitted a copy of Dr. Garrity's June 15, 2009 report and noted, under the subjective portion of the report, that "[appellant] in for follow-up of right upper extremity complaints and reportedly right upper extremity rating exam[ination]." She also submitted reports from Dr. Christopher Olch, a Board-certified orthopedic surgeon specializing in surgery of the hand, who noted treating her left elbow surgery. In a January 27, 2010 report, Dr. Olch provided an impression of recalcitrant lateral epicondylitis of the left elbow and opined additional surgery was warranted.[3]

By decision dated March 17, 2010, an Office hearing representative affirmed the Office's December 22, 2009 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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[6] For consistent results and to ensure equal justice under the law to all claimants, 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

[2] The Office adjusted the starting date of the schedule award to October 25, 2009 as appellant was in receipt of disability compensation through October 24, 2009.

[3] On March 3, 2010 the Office authorized the requested surgical procedures of the left arm, which appellant underwent March 9, 2010.

[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.404.

[6] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

losses.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[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, the evaluator identifies 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).[10] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[11]

After obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for a rationalized opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*.[12]

ANALYSIS

The Office accepted that the repetitive work factors in appellant's employment caused bilateral medial epicondylitis, lateral epicondylitis and right wrist TFCC tear. Appellant underwent right wrist arthroscopic debridement on April 22, 2008 for the TFCC tear. She then underwent left extensor carpi radialis brevis origin release on April 14, 2009 for chronic left lateral epicondylitis.

In a June 15, 2009 report, Dr. Garrity opined, in accordance with the sixth edition of the A.M.A., *Guides*, that appellant had 13 percent upper extremity impairment consisting of 5 percent impairment for the lateral epicondylitis status post release and 8 percent impairment for the TFCC complex tear status post arthroscopic repair. An Office medical adviser reviewed Dr. Garrity's June 15, 2009 report and, while he agreed with Dr. Garrity's application of the A.M.A., *Guides*, he opined that appellant had eight percent permanent impairment of the right upper extremity and five percent permanent impairment of the left upper extremity as the epicondylitis surgery was performed on the left arm while the TFCC surgery was performed on the right arm. The Office issued the schedule award based on the Office medical adviser's findings.

[7] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[8] 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).

[9] A.M.A., *Guides* (6th ed. 2008), page 3, section 1.3, The ICF, Disability and Health: A Contemporary Model of Disablement.

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

[11] *Id.* at 521.

[12] *See* Federal (FECA) Procedure Manual, *supra* note 8, at Chapter 2.808.6(d) (August 2002).

Under Table 15-3, page 396, a Class 1, Grade C, TFCC tear with or without surgery with residual findings equates to eight percent upper extremity impairment. The record reflects that diagnostic testing revealed a TFCC tear and appellant underwent right wrist arthroscopic debridement on April 22, 2008. Thus, as the record supports a TFCC tear on the right side, consistent with the findings of both Dr. Garrity and the Office medical adviser, appellant would be entitled to eight percent upper extremity impairment on the right side. Neither physician found that any adjustment by grade modifiers was warranted with regard to the TFCC tear.

Under Table 15-4, page 399 of the A.M.A., *Guides*, a Class 1 Grade C surgical release of the lateral epicondylitis with residual symptoms equates to five percent upper extremity impairment. As noted, appellant underwent left extensor carpi radialis brevis origin release on April 14, 2009. Although she asserts that Dr. Garrity intended that this was for her right arm, his June 15, 2009 report clearly attributed impairment for lateral epicondylitis status post release. There is no record of surgery for this condition on the right side nor did appellant provide any additional evidence from Dr. Garrity regarding this issue. Thus, for the left extensor carpi radialis brevis origin release, appellant would only be entitled to impairment for the arm affected by that surgery, the left arm. For that surgical procedure, as noted, both Dr. Garrity and the Office medical adviser found that five percent arm impairment was warranted. Neither physician reported any basis for applying grade modifiers to the five percent default rating following surgical release.

The Board finds that both Dr. Garrity and the Office medical adviser properly used the tables and grading formulae of the sixth edition of the A.M.A., *Guides*, for the individual component ratings. The Office medical adviser explained why the rating for the TFCC tear was for the right arm while the rating for the surgical release of the lateral epicondylitis was for the left arm. While Dr. Garrity's impairment rating purports to be for the right side, the medical record clearly supports that the referenced epicondylar surgery, on which he based a portion of his rating, was performed on appellant's left arm. He did not otherwise note any basis on which any additional impairment could be rated, for either arm, pursuant to the A.M.A., *Guides* and consistent with the medical evidence of record. Although appellant also submitted reports by Dr. Olch, he did not rate permanent impairment in accordance with the A.M.A., *Guides*.

The Board finds that the Office properly based appellant's schedule award on the diagnosis of left lateral epicondylitis release and right-side TFCC complex tear status post arthroscopic repair. The Board will therefore affirm the Office's March 17, 2010 decision finding eight percent permanent impairment of the right upper extremity and five percent permanent impairment of the left upper extremity.

On appeal, appellant argues that she has 13 percent permanent for her right arm. In support of her assertion, she submitted a new report from Dr. Garrity. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board for the first time on

appeal.[13] Moreover, as discussed above, the evidence of record reflects that appellant has no more than eight percent permanent impairment of the right upper extremity.

CONCLUSION

The Board finds that appellant has no more than eight percent permanent impairment of the right upper extremity and five percent permanent impairment of the left upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[13] 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).