United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 10-2235**
	)	**Issued: July 26, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Tomah, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 13, 2010 appellant filed a timely appeal from a June 10, 2010 Office of Workers' Compensation Programs' (OWCP) decision which denied her request for a hearing. She also timely appealed its March 22, 2010 schedule award decision. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than a nine percent permanent impairment of her left upper extremity; and (2) whether OWCP properly denied appellant's request for a hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 4, 2002 appellant, then a 55-year-old nursing assistant, filed an occupational disease claim alleging that she sustained a left shoulder condition in the performance of duty. She first became aware of the disease and realized that it was caused or aggravated by her employment on December 10, 2001. Appellant stopped work on December 23, 2001 and returned on December 24, 2001. OWCP accepted the claim for left shoulder tenosynovitis. On October 9, 2002 appellant underwent left shoulder arthroscopic acromioplasty for impingement syndrome. She received compensation benefits.[2]

On November 4, 2009 OWCP received appellant's claim for a schedule award. In a letter dated November 10, 2009, it requested that her treating physician provide an impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (6th ed. 2009) (*hereinafter,* A.M.A., *Guides*).

In a January 5, 2010 report, Dr. Steve A. Bowman, a Board-certified internist, provided an impairment evaluation noting that measurements were undertaken by a physical therapist. He advised that appellant had pain which ranged from 3 out of 10 with light activity, 7 out of 10 greater than not, and 0 out 10 with complete rest; however, it was present on a daily basis and increased with certain movements. Dr. Bowman also noted that appellant could not perform tasks requiring sustained elevation and had pain lifting items greater than five pounds. For example, appellant was unable to carry boxes of computer paper at work and had difficulty filing. The findings for range of motion included flexion of 90 degrees, extension of 50 degrees, abduction of 90 degrees, adductions of 15 degrees, external rotation of 70 degrees and internal rotation of 50 degrees. Dr. Bowman advised that the left shoulder also had atrophy in the deltoid. He advised that appellant had reached maximum medical improvement and had an impairment of nine percent of the left upper extremity.

On February 8, 2010 OWCP's medical adviser reviewed the findings and concurred with Dr. Bowman that appellant had nine percent impairment of the left arm due to impingement syndrome. He noted that appellant experienced activity-related left shoulder pain which was exacerbated with certain movements such as overhead activity and internal rotation. OWCP's medical adviser determined that the physical examination revealed that all surgical incisions had healed and that appellant had some weakness in the rotator cuff musculature. He referred to Figure 15-34 for shoulder range of motion and determined that flexion of 90 degrees would equal a three percent impairment, extension of 50 degrees would equal zero percent impairment, abduction of 90 degrees would equal a three percent impairment, adduction of 15 degrees would equal one percent impairment, external rotation of 70 degrees would equal zero percent impairment and internal rotation of 50 degrees would equal two percent impairment.[3] OWCP's medical adviser added the range of motion values and indicated that would result in a nine percent permanent impairment. He also referred to Table 15-35 and explained that the range of

[2] In a March 29, 2005 decision, OWCP found that appellant's actual earnings as a medical clerk fairly and reasonably represented her wage-earning capacity and terminated her compensation payments. It found that her current wages met or exceeded the wages of the job she held when injured.

[3] A.M.A., *Guides* 475.

motion deficit qualified for a grade 1 modifier.[4] OWCP's medical adviser also referred to Table 15-7 and advised that, because appellant continued to have pain with normal activities, she qualified for grade 2 modifier.[5] He noted the difference of 1, and advised that the permanent impairment award was multiplied by five percent pursuant to Table 15.36 and would result in 9.45 percent impairment.[6] OWCP's medical adviser rounded this down to nine percent. He further estimated that appellant would have reached maximum medical improvement six months postoperatively on April 9, 2003.

In a March 22, 2010 decision, OWCP granted appellant a schedule award for nine percent permanent impairment of the left arm. The award covered a period of 28.08 weeks from April 9 to October 22, 2003.

On May 10, 2010 appellant requested a hearing.

In a June 10, 2010 decision, OWCP found that appellant was not entitled to a hearing as her request was not made within 30 days of the issuance of its March 22, 2010 decision. It exercised its discretion and determined that it would not grant a hearing for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered pertaining to her claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,[7] and its implementing federal regulations,[8] 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, FECA 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, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

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),

[4] *Id*. at 477.

[5] *Id*. at 406.

[6] *Id*. at 477.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id*. at § 10.404(a).

[10] 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).

Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[12]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides,* with the medical adviser providing rationale for the percentage of impairment specified.[13]

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by OWCP.[14]

ANALYSIS -- ISSUE 1

OWCP accepted left shoulder tenosynovitis and authorized arthroscopic acromioplasty, which was performed on October 9, 2002. The Board notes that both Dr. Bowman and OWCP's medical adviser were in agreement that appellant was entitled to an impairment of nine percent to the left upper extremity. Dr. Bowman provided range of motion measurements and other findings but did not specify how he arrived at his findings. For example, he did not refer to the specific tables in the A.M.A., *Guides* to explain his conclusion on impairment. Consequently, OWCP referred the matter to its medical adviser.[15]

Under the sixth edition of the A.M.A., *Guides*, impairments of the upper extremities are covered by Chapter 15 section 15-2, entitled diagnosis-based impairment, provides that diagnosis-based impairment is the primary method of evaluation of the upper limb.[16] The initial step in the evaluation process is to identify the impairment class by using the corresponding diagnosis-based regional grid. In a February 8, 2010 report, OWCP's medical adviser noted that appellant's impairing diagnosis was impingement syndrome.[17] He utilized range of motion findings, as impingement syndrome is a diagnosis for which range of motion impairment may be

[11] A.M.A., *Guides* 494-531*; see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[12] A.M.A., *Guides* 521.

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[14] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[15] *See supra* note 14.

[16] A.M.A., *Guides* 387, section 15.2.

[17] *See id*. at 402, Table 15-5, Shoulder Regional Grid.

used a stand alone measurement.[18] OWCP's medical adviser referred to Figure 15-34 for shoulder range of motion and determined that flexion of 90 degrees would equal a three percent impairment, extension of 50 degrees would equal zero percent impairment, abduction of 90 degrees would equal a three percent impairment, adduction of 15 degrees would equal a one percent impairment, external rotation of 70 degrees would equal zero percent impairment and internal rotation of 50 degrees would equal two percent impairment.[19] He added the range of motion values and indicated that it would result in a nine percent permanent impairment. Following the process set forth in the A.M.A., *Guides* for using range of motion as a stand alone approach to rating impairment in the shoulder joint,[20] OWCP's medical adviser also referred to Table 15-35 and explained that the range of motion deficit qualified for a grade 1 modifier.[21] OWCP's medical adviser also referred to Table 15-7 and advised that, because appellant continued to have pain with normal activities, she qualified for grade 2 modifier.[22] He noted the difference of one, and advised that the permanent impairment award was multiplied by five percent pursuant to Table 15.36 and would result in 9.45 percent impairment.[23] OWCP's medical adviser rounded this down to nine percent. The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number.[24] OWCP's medical adviser further advised that appellant would have reached maximum medical improvement six months postoperatively on April 9, 2003.

The Board finds that OWCP's medical adviser properly applied the A.M.A., *Guides* to the findings of Dr. Bowman in rating impairment to appellant's left upper extremity. Both physicians agreed that appellant sustained nine percent impairment. The weight of medical evidence establishes that appellant has no more than a nine percent impairment of the left upper extremity.

On appeal, appellant's contends that she continues to have residuals and questions why the award ran from April 9 to October 22, 2003. The Board notes that OWCP erred in finding that the date of maximum medical improvement was April 9, 2003. As noted, the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. Dr. Bowman did not indicate a retroactive date of maximum medical improvement and OWCP's medical adviser provided no reasoning for a retroactive date other than noting that it was "estimated" to be April 9, 2003, six months after appellant's shoulder surgery. The Board has noted a reluctance to find a date of

[18] *Id*. at 405. The asterisk in Table 15-5, which covers impingement syndrome, provides that, if motion loss is present, this impairment may alternatively be assessed using section 15.7, range of motion impairment. A range of motion stands alone and is not combined with diagnosis impairment.

[19] *Id*. at 475.

[20] *See id*. at 473-78.

[21] *Id*. at 477.

[22] *Id*. at 406.

[23] *Id*. at 477.

[24] *J.P*., Docket No. 08-832 (issued November 13, 2008).

maximum medical improvement that is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board requires persuasive proof of the selection of a retroactive date of maximum medical improvement.[25] The Board finds there is no persuasive proof supporting a retroactive date of maximum medical improvement and will modify OWCP's schedule award decision to find that the award should run from January 5, 2010, the date of Dr. Bowman's evaluation.[26] The period of the award 28.08 weeks of compensation, represents a percent of the 312 weeks payable for 100 percent loss of the arm.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124 of FECA provides that a claimant is entitled to a hearing before OWCP's representative when a request is made within 30 days after issuance of OWCP's final decision.[27] Section 10.615 of OWCP's regulations provide, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[28] OWCP's regulations provide that a request received more than 30 days after OWCP's decision is subject to OWCP's discretion[29] and the Board has held that OWCP must exercise this discretion when a hearing request is untimely.[30]

ANALYSIS -- ISSUE 1

Appellant requested a hearing on May 10, 2010. The Board notes that the request for a hearing was more than 30 days after OWCP issued its March 22, 2010 decision. Appellant was not entitled to a hearing as a matter of right.

OWCP properly exercised its discretion in denying a hearing upon appellant's untimely request by determining that the issue could be equally well addressed by requesting reconsideration and submitting new evidence. The only limitation on OWCP's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions

[25] *J.C.*, 58 ECAB 258 (2007).

[26] *See supra* note 15 (the date of maximum medical improvement is usually considered to be the date of the evaluation by the attending physician).

[27] 5 U.S.C. § 8124(b)(1).

[28] 20 C.F.R. § 10.615.

[29] *Id*. at § 10.616(b).

[30] *Samuel R. Johnson*, 51 ECAB 612 (2000).

from known facts.[31] There is no evidence of record that OWCP abused its discretion in denying appellant's request for a hearing under these circumstances.

CONCLUSION

The Board finds that appellant has not established that she has more than nine percent permanent impairment of her left upper extremity. The Board also finds that OWCP properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 10, 2010 is affirmed and the March 22, 2010 decision is affirmed, as modified.

Issued: July 26, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

[31] The only limitation on OWCP's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions from known facts. *See Daniel J. Perea*, 42 ECAB 214 (1990). There is no evidence of record that OWCP abused its discretion in denying appellant's request for a hearing under these circumstances.