

On appeal, appellant's counsel contends that appellant is entitled to a schedule award for a greater impairment based on the medical evidence.

FACTUAL HISTORY

On June 27, 2005 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim alleging that on June 25, 2005 she injured her left shoulder, hand and wrist when a cluster box fell on her. OWCP accepted the claim for left shoulder sprain and strain and authorized left shoulder arthroscopic surgery, which occurred on December 13, 2005.

In a January 23, 2008 report, Dr. David Weiss, an examining osteopath, provided physical findings and determined that appellant had a 16 percent left upper extremity impairment using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). Using Tables 16-11, page 484 and 16-15, page 492, he concluded that she had 4 percent impairment for a grade 4/5 left supraspinatus motor strength deficit and 9 percent impairment for a grade 4/5 left deltoid motor strength deficit, resulting in a combined left upper extremity impairment of 13 percent. Dr. Weiss found that appellant also had three percent impairment for pain using Figure 18-1, page 574. Combining these figures, he found a total 16 percent left upper extremity impairment.

Appellant filed a claim for a schedule award on June 21, 2008.

In a September 24, 2008 report, Dr. Morley Slutsky, an OWCP medical adviser, Board-certified in preventive medicine, reviewed Dr. Weiss' report and disagreed with the impairment rating found. He found that appellant had three percent left upper extremity impairment based on the abnormal left shoulder motion. The medical adviser determined that there was one percent impairment for 170 degrees of flexion using Figure 16-40, page 475, a one percent impairment for 160 degrees of abduction using Figure 16-43, page 477 and a one percent impairment for 75 degrees of internal rotation using Figure 16-46, page 479, resulting in a total left upper extremity impairment of three percent. Dr. Slutsky found that including a rating for pain was duplicative and unwarranted.

On December 31, 2008 Dr. Weiss reviewed Dr. Slutsky's report and agreed that the range of motion method should have been used instead of muscle strength, which he had used. He agreed with Dr. Slutsky's calculation of three percent impairment due to loss of range of motion, but disagreed with Dr. Slutsky's opinion that pain should not be included in the impairment rating. In concluding, Dr. Weiss determined that appellant had a total six percent left upper extremity impairment as a result of loss of left shoulder motion and pain.

On February 9, 2009 Dr. Slutsky reviewed Dr. Weiss' December 31, 2008 report and reiterated his opinion that an impairment rating for pain was unwarranted as pain was addressed in the range of motion impairment rating.

On June 4, 2009 OWCP found a conflict in the medical opinion evidence between Drs. Weiss and Slutsky on the issue of appellant's left upper extremity impairment and whether pain should be included separately and referred her to Dr. David J. Greifinger, a Board-certified orthopedic surgeon, for resolution of the conflict.

In an August 11, 2009 report, Dr. Greifinger, reviewed the medical records and statement of accepted facts and performed a physical examination. Appellant reported posterior and anterior symptoms, which radiated into the left trapezius and pain on range of motion, in cold weather and lifting. A physical examination revealed excellent range of motion, which Dr. Greifinger noted was not uncommon following labral repair surgery and a functional rotator cuff. He concluded that appellant had no more than a three percent upper extremity impairment using the fifth edition of the A.M.A., *Guides*. Dr. Greifinger concluded that an impairment rating for pain was not warranted due to the inconsistencies on the extent of her pain noted by Dr. Weiss in his report.

In a September 14, 2009 supplemental report, Dr. Greifinger found a three percent left upper extremity impairment using the sixth edition of the A.M.A., *Guides*. Using Table 15-5, page 404, he determined that class 1 and grade C was appropriate for labral tear, which resulted in a three percent left upper extremity impairment. Dr. Greifinger noted May 31, 2006 as the date of maximum medical improvement.

On January 5, 2010 OWCP received Dr. Greifinger's permanent impairment worksheet which set forth his impairment calculation. Using Table 15-5, page 404, he determined that a left labral lesion was class 1 with a grade modifier of C resulting in three percent impairment.

On February 2, 2010 Dr. Greifinger provided a supplemental report setting forth his impairment calculation with grade modifiers as requested by OWCP. Using grade modifiers, he found grade modifier 1 for functional history using Table 16-7, page 406; a grade 1 modifier for physical examination using Table 15-8, page 408; and a grade modifier 0 for clinical studies using Table 15-9, page 410 as the labral lesion was surgically corrected. Dr. Greifinger noted that, since the impairment class for appellant's surgically corrected labral lesion was class 1, the final net adjustment was grade B. Using Table 15-5, page 404, a class B impairment equates to a two percent left upper extremity impairment for labral lesions. Dr. Greifinger opined that he thought "a more appropriate number still is three percent utilizing [g]rade C" even though he acknowledged that using the quantification system set forth by the sixth edition of the A.M.A., *Guides* results in a lower impairment of two percent.

On February 22, 2010 Dr. Henry J. Magliato, an OWCP medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Greifinger's report and concurred with the two percent left upper extremity impairment rating. He determined August 11, 2009 as the date of maximum medical improvement based on the date of Dr. Greifinger's first report. In an August 12, 2010 supplemental report, Dr. Magliato agreed with Dr. Greifinger's determination of May 31, 2006 as the date of maximum medical improvement.

By decision dated August 18, 2010, OWCP granted appellant a schedule award for a two percent left upper extremity impairment.

In a letter dated August 23, 2010, appellant's counsel requested reconsideration requesting that the fifth edition of the A.M.A., *Guides* be used in calculating appellant's impairment rating.

By decision dated September 9, 2010, OWCP denied reconsideration of the merits on the grounds that no new and relevant evidence or arguments were advanced by appellant.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA² and its implementing regulations³ 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 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 losses.⁴ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁵

In addressing upper extremity impairments, the sixth edition 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).⁶ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁷

Section 8123(a) of FECA⁸ provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁹ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁰

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁶ A.M.A., *Guides* (6th ed. 2009) at 494-531, *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

⁷ *Id.* at 521

⁸ 5 U.S.C. §§ 8101-8193

⁹ *Id.* at § 8123(a); *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁰ *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

ANALYSIS -- ISSUE 1

OWCP accepted the claim for left shoulder sprain and strain and authorized left shoulder arthroscopic surgery. Appellant received a schedule award for a two percent impairment of the left upper extremity. The issue is whether she has established that she is entitled to a schedule award for more than the two percent impairment of her left upper extremity.

Dr. Weiss, an examining osteopath, concluded that appellant had a six percent left upper extremity impairment. Dr. Slutsky, an OWCP medical adviser, reviewed this report and found a three percent left upper extremity impairment. Due to the difference of opinion between Dr. Weiss and Dr. Slutsky, an OWCP medical adviser, regarding the extent of appellant's permanent impairment and whether pain should be separately considered, OWCP determined that there was a conflict in medical opinion evidence and referred her to Dr. Greifinger, a Board-certified orthopedic surgeon, selected as the impartial medical examiner.

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 (DBI), indicates that DBI is the primary method of evaluation of the upper limb.¹¹ The initial step in the evaluation process is to identify the impairment class by using the corresponding diagnosis-based regional grid. Dr. Greifinger noted that utilized Chapter 15 with the relevant section of the Shoulder Regional Grid, Table 15-5, A.M.A., *Guides* 404. He identified a class 1 impairment based labral lesions with residuals symptoms. 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 represents three percent upper extremity impairment.¹²

After determining the impairment class and default grade, Dr. Greifinger determined whether there were any applicable grade adjustments for so-called nonkey factors or modifiers. These include adjustments for GMFH, GMPE and GMCS. The grade modifiers are used in the Net Adjustment Formula (NAF) to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down from the default value C by the calculated net adjustment. Dr. Greifinger then found, a grade modifier of 1 for GMFH, a grade modifier of 1 for GMPE, a grade modifier of 0 for GMCS, a grade modifier of 1 for class of diagnosis regional grid (CDX). The NAF for this case is $(GMFH - CDX \text{ or } 1 - 1 = 0) + (GMPE - CDX \text{ or } 1 - 1 = 0) + (GMCS - CDX \text{ or } 0 - 1 = -1)$ which resulted in a minus one net adjustment $(0 + 0 + -1 = -1)$. The default value of three under grade C moved one to the left to a grade B or two percent impairment. Dr. Greifinger also concluded that, due to the inconsistencies as the extent and degree of appellant's pain as reported by Dr. Weiss, a rating for pain was not warranted.

On February 22, 2010 Dr. Magliato, an OWCP medical adviser, reviewed Dr. Greifinger's reports and concurred with his use of the A.M.A., *Guides* and the impairment rating.

¹¹ Section 15.2, A.M.A., *Guides* 387.

¹² The grades range from A to E, with A representing one (1) percent upper extremity impairment, B representing two (2) percent impairment, C representing three (3) percent impairment, D representing four (4) percent impairment and E representing five (5) percent impairment. Table 15-5, A.M.A., *Guides* 404.

The Board finds that Dr. Greifinger's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background and resolved the conflict in medical opinion evidence. Dr. Greifinger examined appellant, reviewed his medical records and reported accurate medical and employment histories. Although he noted, without explanation, that three percent impairment of the left upper extremity was preferable, he acknowledged that there was no basis in the A.M.A., *Guides* on which to attribute any greater impairment. OWCP properly relied upon Dr. Greifinger's report. Dr. Magliato, an OWCP medical adviser, agreed with Dr. Greifinger's assessment of two percent based on the application of the A.M.A., *Guides*.¹³ There is no probative medical evidence of record establishing that appellant has more than two percent impairment of the left upper extremity.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁴ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁷

ANALYSIS -- ISSUE 2

In her August 23, 2010 request for reconsideration, appellant's counsel did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Appellant did not submit any pertinent new and relevant evidence with her request for reconsideration. The issue to be resolved is a medical one and she did not submit any medical evidence with her request. Consequently, appellant is not entitled to a review of the merits of her claim based on the above-noted requirements under section 10.606(b)(2).

¹³ See generally, *E.B.*, Docket No. 09-1321 (issued April 1, 2010).

¹⁴ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹⁵ 20 C.F.R. § 10.606(b)(2). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁶ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁷ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

The Board finds that OWCP properly determined that appellant was not entitled to further consideration of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(2) and thus OWCP properly denied her August 23, 2010 request for reconsideration.

CONCLUSION

The Board finds that appellant has two percent left upper extremity impairment for which she received a schedule award. The Board further finds that OWCP properly refused to reopen her case for further merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 9 and August 18, 2010 are affirmed.

Issued: October 12, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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