United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
and	)	**Docket No. 11-195**
	)	**Issued: October 27, 2011**
DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, Fairview Heights, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 2, 2010 appellant filed a timely appeal from an October 15, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an additional schedule award. 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 this claim.

ISSUE

The issue is whether appellant has greater than a total 48 percent impairment to his left upper extremity for which he received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. In an August 18, 2010 decision, the Board set aside a July 22, 2009 OWCP decision denying appellant's request for an additional

[1] 5 U.S.C. § 8101 *et seq.*

schedule award.[2] The Board found that Dr. Daniel D. Zimmerman, an OWCP medical adviser Board-certified in internal medicine, had not specifically addressed whether the diagnosis-based impairment (DBI) estimates in this particular case had adequately encompassed any nerve impairment. On remand, OWCP's medical adviser was instructed to provide clarification, specifically with respect to that issue. The facts and the circumstances of the case as set out in the Board's prior decision are incorporated herein by reference.[3]

The relevant medical evidence from the prior appeal is the June 21, 2009 report from Dr. Zimmerman, who had reviewed appellant's impairment claim using the sixth edition of the A.M.A., *Guides* following instructions from OWCP. Dr. Zimmerman noted that the sixth edition was diagnosis based and only one diagnosis was appropriate. Using Table 15-5, page 404, he found the default impairment value for a labral tear was three percent. Next, Dr. Zimmerman stated that, using Table 15-5, page 403, appellant's dislocated shoulder would be a class 3 and noted that the default impairment value permits a 46 percent impairment. Using the Table 15-21, page 436, OWCP's medical adviser noted that appellant had a severe motor deficit, but explained that, even if appellant had a very severe motor impairment, the highest range he could receive was 35 percent, less than that already awarded. Dr. Zimmerman stated that, based on the range of motion values reported on November 6, 2008 by Dr. David T. Volarich, an examining osteopath, which limited appellant's activities of daily living (ADL) and applying Table 15-34, page 475, appellant's range of motion deficits would result in a total 25 percent left upper extremity. In concluding, he stated that using the sixth edition of the A.M.A., *Guides* does not establish that appellant is entitled to a schedule award for more than 48 percent left upper extremity impairment.

On return of the case record, OWCP requested clarification from its medical adviser as to whether the peripheral nerve impairment had been adequately considered under the DBI evaluation. On September 12, 2010 Dr. Zimmerman provided findings based on the November 6, 2008 report from Dr. Volarich. He had found a 25 percent permanent impairment for left shoulder multidirectional instability. Using Table 15-5, page 404, Dr. Zimmerman identified the impairment class as multidirectional shoulder instability with a class 2 impairment based on the history of acute trauma and grade 3 or 4 instability with consistent relationship of symptoms and activities. Next, he determined a grade 2 modifier was appropriate using Table 15-7, page 406, for Functional History (GMFH) adjustment based on pain symptoms and ability to perform activities with modification and unassisted. Using Table 15-8, page 408,

[2] Docket No. 09-2371 (issued August 18, 2010).

[3] On June 22, 2000 appellant, then a 37-year-old special agent, filed a traumatic injury claim alleging that on June 2, 2000 he dislocated his left shoulder while performing pull-ups for his physical certification. OWCP accepted the claim for left shoulder labral tear and authorized left shoulder arthroscopy with anterior shoulder reconstruction, which was performed on July 26, 2000. It accepted a recurrence of disability beginning February 10, 2003 and authorized shoulder surgery, which occurred on April 22, 2003. On April 25, 2006 OWCP accepted appellant's claim for a recurrence of disability beginning March 23, 2006 and authorized left arthroscopic surgery, which was performed on May 15, 2006. It expanded the acceptance of appellant's claim to include hemorrhage of the gastrointestinal tract and injury to the left axillary nerve. By decision dated April 9, 2002, OWCP issued a schedule award for 27 percent permanent impairment of the left upper extremity. On September 2, 2005 it granted appellant a schedule award for an additional 21 percent impairment of the left upper extremity, resulting in a total 48 percent left upper extremity impairment.

Dr. Zimmerman concluded that appellant's atrophy represented a grade 3 modifier under Physical Examination (GMPE) and adjustment for the proximal arm. He next found that using Table 15-9, page 410, Clinical Studies (GMCS) adjustment, and Table 15-34, page 475, a grade modifier 4 was appropriate for appellant's range of motion and shoulder pathology. In order to determine the final impairment under the sixth edition, Dr. Zimmerman applied the net adjustment formula (NAF): GMFH (2) minus Class of Diagnosis (CDX) (2) plus GMPE (4) minus CDX (2) plus GMCS (4) minus CDX (2). Based on the formula, he determined that the net adjustment modifier was four. Dr. Zimmerman advised that the plus 4 net adjustment modifier for the multidirectional instability bilateral shoulder allowed for adjustment to be processed at a grade E which represented 25 percent impairment of the left upper extremity. With respect to the axillary nerve impairment, he found the axillary nerve deficit with weakness represented a class 2 for severe motor deficit with weakness rated at 1-2/5. Dr. Zimmerman concluded that there was no extra rating for pain in the distribution of the axillary nerve as pain was "processed" using the grade modifiers. Using Table 15-21, page 436 he noted a class 2 impairment permitted "a rating of 18 to 25 percent with the default value being 22 percent."[4] Using the Combined Values Chart at page 604, Dr. Zimmerman found that combining 25 percent and 25 percent resulted in a total 44 percent left upper extremity impairment.

By decision dated October 15, 2010, OWCP denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing regulations[6] 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.[7] 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.[8]

In addressing upper extremity impairments, the sixth edition identifying the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on GMFH,

[4] A.M.A., *Guides*, Table 15-21, page 436.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.*

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

GMPE and GMCS.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through OWCP's 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.[11]

ANALYSIS

OWCP accepted the claim for left shoulder labral tear, which was subsequently expanded to include a hemorrhage of the gastrointestinal tract and injury to the left axillary nerve. By decision dated April 9, 2002, it issued a schedule award for 27 percent permanent impairment of the left upper extremity. On September 2, 2005 OWCP granted appellant a schedule award for an additional 21 percent impairment of the left upper extremity, resulting in a total 48 percent left upper extremity impairment. In an August 18, 2010 decision, the Board found that the case was not in posture for decision regarding the extent of his left upper extremity impairment as clarification from OWCP's medical adviser on the issue of whether the peripheral nerve impairment should have been combined with the diagnosis-based impairment rating was required.

On remand, Dr. Zimmerman clarified with specificity that each of the characteristics of peripheral nerve impairment had been appropriately considered in the DBI ratings. He noted that "weakness was a manifestation of the axillary nerve injury and ... was considered with the earlier ratings." Further, Dr. Zimmerman noted that atrophy of the deltoid "could and would be due to range of motion limitations of a chronic nature which over time would yield disuse atrophy and/or be due to the denervation of the deltoid due to the axillary nerve injury." His report provided adequate clarification that any impairment due to the axillary nerve was adequately considered under the DBI method of impairment rating. To do otherwise would create duplication or unwarranted increase in the impairment estimate.

The Board finds OWCP properly developed this aspect of the claim and finds it properly denied any increased schedule award benefits.

CONCLUSION

The Board finds that appellant has no more than 48 percent permanent impairment of the left upper extremity.

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

[10] *Id*. at 521

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010). *See Frantz Ghassan*, 57 ECAB 349 (2006); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 15, 2010 is affirmed.

Issued: October 27, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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