United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 11-289**
	)	**Issued: September 12, 2011**
U.S. POSTAL SERVICE, POST OFFICE, New Castle, DE, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 16, 2010 appellant, through his representative, filed a timely appeal from the July 30, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning his entitlement to schedule award compensation. 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 case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a 12 percent permanent impairment of his right arm, for which he received schedule award compensation.

FACTUAL HISTORY

In March 2007 OWCP accepted that appellant, then a 55-year-old letter carrier, sustained impingement syndrome of his right shoulder due to performing his repetitive work duties over an

[1] 5 U.S.C. §§ 8101-8193.

extended period. On April 13, 2007 appellant underwent right shoulder arthroscopic acromioplasty, bursectomy and excision arthroplasty of the distal clavicle. The procedures were authorized by OWCP. Appellant stopped work for various periods and received wage-loss disability compensation.

In an August 18, 2009 report, Dr. David Weiss, an attending osteopath, provided an impairment rating of appellant's right arm under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). He calculated a five percent impairment rating due to entrapment neuropathy of the left ulnar nerve at the elbow and a three percent impairment rating for a class 1 left shoulder impingement syndrome with residual loss.[2] Dr. Weiss used the Combined Values Chart starting on page 604 to combine the five percent and three percent impairment ratings and conclude that appellant had a total permanent impairment of the left arm of eight percent. He also indicated that appellant had a 12 percent impairment rating for a class 1 right shoulder acromioclavicular arthropathy with distal clavicle excision and a two percent impairment rating for sensory deficit at the right C7-8 level.[3] Dr. Weiss used the Combined Values Chart to combine the 12 percent and 2 percent impairment ratings and conclude that appellant had a total permanent impairment of the right arm of 14 percent.

On November 4, 2009 appellant filed a claim for a schedule award due to his accepted work condition.

On February 7, 2010 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as OWCP's medical adviser, found that Dr. Weiss' impairment ratings for an entrapment neuropathy of the left ulnar nerve at the elbow, a left shoulder impingement syndrome with residual loss and a sensory deficit at the right C7-8 level were not related to any accepted or preexisting conditions and could not be considered in the impairment rating. He based his rating on a class 1, grade modifier 2 impairment for a postdistal clavicle resection or acromioclavicular separation, which he felt was the impairment rating most favorable to appellant. Dr. Berman concluded that appellant had a 12 percent permanent impairment of his right arm based on the standards of the sixth edition of the A.M.A., *Guides*.[4]

In a February 26, 2010 award of compensation, OWCP granted appellant a schedule award for a 12 percent permanent impairment of his right arm. It based the schedule award on the February 7, 2010 opinion of Dr. Berman.

Appellant requested a video hearing with OWCP's hearing representative. He did not appear at the hearing held on June 17, 2010. Counsel argued that OWCP should have accepted Dr. Weiss' impairment ratings which considered several preexisting medical conditions.

In a July 30, 2010 decision, OWCP's hearing representative affirmed its February 26, 2010 decision.

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[2] *See* A.M.A., *Guides* 402, 406, 408, Table 15-5, 15-7 and Table 15-8.

[3] *Id.* at 403, 410, 441, Table 15-5, Table 15-9 and Table 15-21.

[4] *Id.* at 403, Table 15-5.

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] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[8]

It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[9]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the Class of Diagnosis (CDX) is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The net adjustment formula is GMFH - CDX + GMPE - CDX + GMCS - CDX.[10] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[11]

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *Id*.

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b (June 1993). This portion of OWCP procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

[10] *See* A.M.A., *Guides* (6th ed. 2009) 401-11. Table 15-5 also provides that, if motion loss is present for a claimant who has undergone a shoulder arthroplasty, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Such a range of motion impairment stands alone and is not combined with a diagnosis impairment. *Id.* at 405, 475-78.

[11] *Id.* at 23-28.

ANALYSIS

In the present case, OWCP accepted that appellant sustained impingement syndrome of his right shoulder. On April 13, 2007 appellant underwent right shoulder arthroscopic acromioplasty, bursectomy and excision arthroplasty of the distal clavicle.

The Board finds that OWCP properly relied on the February 7, 2010 opinion of Dr. Berman, a Board-certified orthopedic surgeon serving as OWCP's medical adviser, in granting a schedule award for 12 percent permanent impairment of appellant's right arm. Dr. Berman properly determined that appellant's right arm impairment was best characterized as a class 1, grade modifier 2 impairment for a post distal clavicle resection or acromioclavicular separation under Table 15-5 of the sixth edition of the A.M.A., *Guides*. He chose the appropriate diagnostic category, properly chose the relevant class and grade modifiers and correctly applied the net adjustment formula.[12]

Before OWCP and on appeal to the Board, appellant's counsel argued that Dr. Berman did not evaluate certain work-related or preexisting impairments that were included by Dr. Weiss, an attending osteopath, in his August 18, 2009 impairment rating evaluation.[13] The Board finds, however, that Dr. Berman properly found that Dr. Weiss incorrectly included impairment ratings for an entrapment neuropathy of the left ulnar nerve at the elbow, a left shoulder impingement syndrome with residual loss and a sensory deficit at the right C7-8 level because these impairments were not related to accepted or preexisting conditions. In this respect, the opinion of Dr. Weiss is of limited probative value and Dr. Weiss failed to provide adequate narrative explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by OWCP.[14] He addressed surgery in November 1997 that pertained to appellant's left upper extremity but did not adequately explain how the medical records established any preexisting right upper extremity condition.

Therefore, appellant did not show that he had` more than a 12 percent permanent impairment of his right arm and OWCP properly denied his claim for greater schedule award compensation. He 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.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 12 percent permanent impairment of his right arm, for which he already received schedule award compensation.

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[12] *See supra* notes 9 and 10.

[13] Dr. Weiss found a 14 percent impairment of the right arm and an 8 percent impairment of the left arm.

[14] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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