United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 11-1169**
	)	**Issued: March 22, 2012**
U.S. POSTAL SERVICE, POST OFFICE, St. Petersburg, FL, Employer	)	

Appearances:
Victor A. Walker, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 14, 2011 appellant, through her representative, filed a timely appeal from a December 29, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 has established that she is entitled to a greater than five percent permanent impairment of the right upper extremity, for which she received a schedule award.

On appeal, appellant's representative contends that OWCP erred in denying her request for an increased schedule award as the medical evidence from her physician supports an increased schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 14, 2004 appellant, then a 37-year-old mail processor clerk, filed a traumatic injury claim alleging that on that day she sustained muscle and arm strain in the performance of duty. OWCP accepted the claim for right shoulder strain and right rotator cuff syndrome.[2]

On August 22, 2006 OWCP granted appellant a schedule award for a five percent permanent impairment of the right arm.

On October 14, 2010 appellant filed a claim for a schedule award and submitted a September 30, 2010 report from Dr. John W. Ellis, a Board-certified family practitioner, in support of her request. Dr. Ellis diagnosed right shoulder traumatic arthritis, tendinosis, rotator cuff tear and internal derangement and right brachial plexus impingement. He reviewed medical evidence and provided physical findings. In applying the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009), Dr. Ellis reported a Disabilities of the Arm, Shoulder and Hand (*Quick*DASH) score of 82 for both upper extremities. He concluded that appellant had 13 percent right upper extremity impairment based on the sixth edition of the A.M.A., *Guides*. Dr. Ellis based his impairment rating on her decreased right shoulder range of motion and used Table 15-34, p. 475. Using Table 15-34, p. 475, he determined that appellant had 3 percent impairment for 88 degrees flexion; a 1 percent impairment for 41 degrees extension; a 3 percent impairment for 21 degrees abduction; a 1 percent impairment for 40 degrees adduction and 4 degrees impairment for 26 degrees internal rotation, resulting in a total 12 percent right upper extremity impairment for decreased shoulder motion. Next Dr. Ellis found that she had a total 13 percent impairment based on modifiers of a grade 1 and grade modifier based on functional history of 3.

On October 29, 2010 an OWCP medical adviser reviewed Dr. Ellis' report and disagreed with his impairment rating. He concurred that appellant had reached maximum medical improvement as appellant was reluctant to have surgery and that Dr. Ellis correctly used the A.M.A, *Guides* (6th ed.). However, the medical adviser noted that he suspected symptom magnification based on a *Quick*Dash score greater than 60 and appellant's declining surgery. Therefore, he recommended an additional orthopedic examination as the range of motion findings were not reliable and should not be used to calculate appellant's impairment rating.

By decision December 29, 2010, OWCP found the evidence insufficient to warrant issuance of an additional schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

[2] Appellant retired from the employing establishment effective April 9, 2007.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

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.[5] 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.[6]

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).[7] 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).[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9]

ANALYSIS

OWCP accepted the claim for right shoulder strain and right rotator cuff syndrome as a result of appellant's April 14, 2004 employment injury. It granted her a schedule award for a five percent permanent impairment of the right arm on August 22, 2006. On December 29, 2010 OWCP denied appellant's request for an additional schedule award based upon an October 29, 2010 report from OWCP's medical adviser.

Dr. Ellis, appellant's attending physician, concluded that appellant had 13 percent impairment of the right upper extremity after applying the sixth edition of the A.M.A., *Guides.* OWCP's medical adviser, in the October 29, 2010 report, concluded that Dr. Ellis had correctly applied the A.M.A., *Guides*, but opined that an impairment rating based on range of motion was not appropriate. He recommended OWCP refer for a second opinion evaluation to determine appellant's impairment rating. In its December 29, 2010 decision, however, OWCP did not address OWCP's medical adviser's recommendation and failed to follow the instruction to further develop the medical evidence.

[5] *Id. See C.M.*, Docket No. 09-1268 (issued January 22, 2010); *Billy B. Scoles*, 57 ECAB 258 (2005).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claim*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[8] *Id*. at 383-419.

[9] *Id.* at 411.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[10] While appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[11] OWCP undertook development of the medical evidence by referring Dr. Ellis' report to OWCP's medical adviser for review. The medical adviser recommended referral to a second opinion physician for a determination of appellant's permanent impairment, which OWCP did not do. It thus, has an obligation to secure a report adequately addressing the relevant issue of the extent of appellant's right extremity impairment. The Board therefore sets aside the December 29, 2010 OWCP decision and remands for OWCP to refer the case back to Dr. Ellis to review its medical adviser's October 29, 2010 report finding the range of motion findings unreliable. On remand OWCP should instruct Dr. Ellis to clearly indicate the specific background and protocols of the A.M.A., *Guides* forming the basis of his opinion. After such further development of the record as it deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision as additional development of the medical opinion evidence is required.

[10] *R.B.*, Docket No. 08-1662 (issued December 18, 2008); *A.A.*, 59 ECAB 726 (2008); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

[11] *D.N.*, 59 ECAB 576 (2008); *Richard E. Simpson*, 55 ECAB 490 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 29, 2010 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: March 22, 2012
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