United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
and	)	**Docket No. 12-1179**
	)	**Issued: November 6, 2012**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Tampa, FL, 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
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On May 7, 2012 appellant filed a timely appeal from a January 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 entitlement to a schedule award pursuant to 5 U.S.C. § 8107.

FACTUAL HISTORY

On March 10, 2005 appellant, then a 47-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on March 4, 2005 she sustained injuries while pushing a cart of

[1] 5 U.S.C. § 8101 *et seq.*

mail. She indicated that the right side of her upper body sustained numbness. On April 20, 2005 OWCP accepted the claim for aggravations of: neck sprain/strain, right rotator cuff syndrome, right carpal tunnel syndrome, and right lateral and medial epicondylitis. On February 15, 2006 it accepted the claim for cervical disc herniation C6-7 and cervical spondylosis.

Appellant received compensation for wage loss through June 6, 2009. The record contains a June 8, 2009 letter stating that she had elected benefits through the Office of Personnel Management (OPM). The employing establishment made appellant a job offer dated October 15, 2009 for a modified mail processing clerk at six hours per day. OWCP continued to develop the medical evidence with respect to her ability to perform the offered job duties. In a report dated February 17, 2010, Dr. Robert Elkins, a Board-certified orthopedic surgeon selected as a referee physician, opined that the herniated cervical disc at C6-7, cervical spondylosis and labral tear of the shoulder had not resolved. He opined in a September 8, 2010 report that appellant could perform the offered position.

On November 7, 2011 appellant submitted a claim for compensation (Form CA-7) indicating that she was claiming a schedule award. She submitted a September 12, 2011 report from Dr. Samy Bishai, an attending physician and orthopedic surgeon. For the right shoulder, Dr. Bishai provided results on range of motion: 90 degrees flexion, 30 degrees extension, 90 degrees abduction, 20 degrees adduction, 30 degrees internal rotation and 50 degrees external rotation. He opined that, under Table 15-34 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition), appellant had a 12 percent right arm impairment based on loss of range of motion. Dr. Bishai opined that appellant had reached maximum medical improvement for her work injuries sustained on March 4, 2005.

In a report dated November 14, 2011, an OWCP medical adviser stated that there were "credibility issues" and recommended a second opinion examination.

By letter dated November 16, 2011, OWCP advised appellant that it was referring her for a referee examination to resolve a conflict. The statement of accepted facts reported that the accepted conditions were aggravation of cervical disc herniation at C6-7 and aggravation of cervical spondylosis, as well as the aggravations accepted on April 20, 2005. Appellant was referred to Dr. Gilberto Vega, a Board-certified orthopedic surgeon.

In a report dated January 19, 2012, Dr. Vega provided a history and results on examination. He stated that appellant had "[l]ong[-]standing preexisting cervical spondylosis with well-documented preexisting pathological changes in the cervical spine that, based on my neurological evaluation today, has no neurological deficit in this patient." Dr. Vega also found that she had a "long[-]standing history of preexisting (to the date of injury) pathological changes in both shoulders as has been documented on MRI scan studies obtained on [May 19, 2003] and the follow-up studies obtained on [March 8, 2005] as has been documented." He opined that he did not find aggravation of the "preexisting pathology" and he believed appellant had reached maximum medical improvement and could return to work with existing restrictions. Dr. Vega further stated, "Therefore I do not find this patient to have any aggravation of the preexisting pathology that has been documented prior to her date of injury of March 5, 2005 and therefore I will not submit a disability rating since this was already preexisting as I have already documented."

In a report dated January 26, 2012, an OWCP medical adviser stated that he had reviewed the January 19, 2012 report and agreed with Dr. Vega that there was no employment-related permanent impairment of the upper extremity.

By decision dated January 30, 2012, OWCP found appellant was not entitled to a schedule award pursuant to 5 U.S.C. § 8107. It found the weight of the evidence was represented by Dr. Vega.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[2] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[3] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[4]

ANALYSIS

In the present case, appellant submitted a September 12, 2011 report from Dr. Bishai with an opinion that she had 12 percent right upper extremity impairment, based on loss of shoulder range of motion under Table 15-34. OWCP did not discuss this report in its January 30, 2012 decision. The Board notes that range of motion can be used as a stand-alone rating, although the A.M.A., *Guides* state that a diagnosis-based impairment is the preferred method.[5] The use of a range of motion table is appropriate when "other grids refer you to this section or when no other diagnosis-based sections of this chapter are applicable for impairment rating of a condition."[6] Dr. Bishai did not specifically discuss the use of Table 15-34 in view of these guidelines.

OWCP referred appellant to Dr. Vega for examination. While it refers to a conflict, there was no evidence of an existing conflict under 5 U.S.C. § 8123(a).[7] The only physician with an opinion as to permanent impairment was Dr. Bishai, the attending physician. An OWCP medical

[2] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[3] *A. George Lampo*, 45 ECAB 441 (1994).

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

[5] A.M.A., *Guides* 461.

[6] *Id.*

[7] FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321.

adviser had referred briefly to "credibility issues" in a November 14, 2011 report without further explanation and his report is not sufficient to create a conflict. The referral to Dr. Vega is therefore as a second opinion physician.[8]

The November 15, 2011 statement of accepted facts provided to Dr. Vega states, "The case was accepted for the following conditions: aggravation of cervical strain; aggravation of right rotator cuff syndrome; aggravation of right carpal tunnel syndrome; aggravation of right lateral epicondylitis; aggravation of right medial epicondylitis; aggravation of cervical disc herniation C6-7 and aggravation of cervical spondylosis." On February 15, 2006 OWCP advised appellant that the accepted cervical conditions were cervical spondylosis and C6-7 disc herniation, not an aggravation of such conditions. A February 23, 2006 statement of accepted facts does not refer to aggravation of these cervical conditions, nor does a November 14, 2011 memorandum to an OWCP medical adviser. If OWCP is rescinding an accepted condition, it needs to make appropriate findings and issue a proper decision.[9] There is no such evidence in the record.

The Board accordingly finds that the November 15, 2011 statement of accepted facts did not accurately present the accepted medical conditions. Dr. Vega opined that appellant did not have an employment-related permanent impairment as there were no continuing aggravations of a preexisting pathology. Since the accepted conditions included cervical conditions that were not considered aggravations, Dr. Vega's opinion was not properly based on an accurate factual background. When a second opinion physician or OWCP medical adviser's opinion is based on a statement of accepted facts that is inaccurate, the opinion is of diminished probative value.[10] As OWCP sought the opinion of Dr. Vega, it has the responsibility to obtain a report which resolves the issues presented in the case.[11]

The Board hereby remands this case to OWCP for a preparation of an appropriate statement of accepted facts and a supplemental report from Dr. Vega on the issue presented. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for further development of the medical evidence.

[8] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[9] *See D.C.*, Docket No. 10-2052 (issued August 16, 2011).

[10] *See E.O.*, Docket No. 12-517 (issued July 6, 2012); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[11] *See Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 30, 2012 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 6, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board