United States Department of Labor
Employees' Compensation Appeals Board

S.P., Appellant	)	
and	)	**Docket No. 12-1197**
	)	**Issued: October 24, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Elkins Park, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 8, 2012 appellant, through his attorney, with the assistance of counsel, timely appealed the January 18, 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 the claim.[2]

ISSUE

The issue is whether appellant has greater than 20 percent impairment of the right upper extremity (RUE).

[1] 5 U.S.C. §§ 8101-8193.

[2] Subsequent to the hearing representative's January 18, 2012 schedule award decision, OWCP issued both preliminary and final overpayment decisions finding a $9,570.53 overpayment due to a third-party recovery surplus that should have been deducted from appellant's schedule award. The notice of appeal and accompanying brief that counsel filed on May 8, 2012 did not reference the March 13, 2012 final overpayment decision. Instead, counsel focused entirely on the January 18, 2012 schedule award decision. Because counsel has not specifically requested review of the March 13, 2012 overpayment decision, the Board will not exercise jurisdiction over that particular decision. *See* 20 C.F.R. § 501.3(c)(4) and (c)(5).

FACTUAL HISTORY

On November 21, 2006 appellant, then a 34-year-old letter carrier, was involved in an employment-related motor vehicle accident. OWCP initially accepted his claim for neck sprain, but later expanded the claim to include cervical intervertebral disc displacement and radiculopathy. It paid appropriate wage-loss compensation.

On July 1, 2011 appellant filed a claim for a schedule award. In support of his claim, he submitted a March 15, 2011 impairment rating from Dr. Nicholas Diamond,[3] who examined appellant and reviewed prior medical records, including two cervical magnetic resonance imaging (MRI) scans and electrodiagnostic studies (EMG/NCV). Dr. Diamond diagnosed post-traumatic cervical disc syndrome, herniated nucleus pulposus at C3-4 and C6-7 and right C5, C6 and C7 partial denervation. He also diagnosed cervical spine strain and sprain and chronic myofascial pain syndrome. Applying the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2008), Dr. Diamond found a combined 23 percent RUE impairment due to motor strength deficits involving the right deltoid (7 percent), right biceps (6 percent) and right triceps (12 percent). He relied primarily on Table 15-21, Peripheral Nerve Impairment, A.M.A., *Guides* 436-44 (6th ed. 2008). Dr. Diamond found that appellant reached maximum medical improvement (MMI) as of March 15, 2011.

In a report dated July 20, 2011, the district medical adviser (DMA), Dr. Christopher R. Brigham, found 20 percent RUE impairment.[4] He explained that Table 15-21, A.M.A., *Guides* 436-44 (6th ed. 2008) was not the appropriate method of evaluating cervical spinal nerve impairment under FECA. Dr. Brigham further explained that the documented deltoid, biceps and triceps weakness were related to the C5, C6 and C7 nerve roots and represented a mild motor loss. Applying the appropriate table for rating spinal nerve impairment, he found a combined RUE impairment of 20 percent. According to the DMA, appellant reached MMI as of June 3, 2010.[5]

By decision dated July 25, 2011, OWCP granted a schedule award for 20 percent impairment of the RUE. The award covered a period of 62.4 weeks from June 3, 2010 through August 13, 2011.[6]

Appellant requested a hearing which was held on November 16, 2011.[7] OWCP received an August 8, 2011 report from his treating physician, Dr. Kaplan, who noted that he had

[3] Dr. Diamond specializes in pain management.

[4] Dr. Brigham is Board-certified in occupational medicine.

[5] This date was based on the results of an examination performed by appellant's treating physician, Dr. Richard H. Kaplan, a Board-certified physiatrist. When he saw appellant on June 3, 2010, Dr. Kaplan found he had reached MMI.

[6] On August 5, 2011 OWCP paid appellant $35,930.43 for the period June 3, 2010 to July 30, 2011. It paid him an additional $1,184.87 on August 26, 2011. This latter payment covered the period July 31 to August 13, 2011. The record indicates that appellant had a $9,570.53 surplus from a third-party recovery, which OWCP did not deduct from the schedule award payments it disbursed in August 2011.

[7] At the hearing, appellant's counsel argued that there was a conflict in medical opinion between Dr. Diamond and the DMA. Counsel also acknowledged there was a third-party recovery.

reviewed Dr. Diamond's report and agreed with his finding that appellant had 23 percent impairment of the RUE.

In a January 18, 2012 decision, the hearing representative affirmed OWCP's July 25, 2011 schedule award for 20 percent impairment of the RUE.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[8] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[9] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[10]

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or the implementing regulations.[11] Neither, FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[12] However, a schedule award is permissible where the employment-related back condition affects the upper and/or lower extremities.[13]

The sixth edition of the A.M.A., *Guides* (2008) provides a specific methodology for rating spinal nerve extremity impairment.[14] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine.[15] The impairment is premised on evidence of radiculopathy affecting the upper and/or lower extremities.[16] The methodology for rating spinal nerve impairment is set forth in Federal (FECA) Procedure Manual and includes applicable tables.[17]

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[8] For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[9] 20 C.F.R. § 10.404.

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

[11] *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

[12] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[13] *Supra* note 9, Chapter 2.808.6a(3).

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

[15] *Id.*

[16] *Id*.

[17] *Id.*

ANALYSIS

On appeal, counsel argued that there was an unresolved conflict in medical opinion between Dr. Diamond and the DMA. Appellant's counsel also argued that there was a conflict of interest for Dr. Brigham to act as the DMA because he authored the A.M.A., *Guides* (6th ed. 2008). With respect to this latter argument, the Board notes that there is no allegation of bias on the part of Dr. Brigham. Counsel merely argued that the DMA's opinion should not be relied upon because of his prior involvement with the A.M.A., *Guides*. It is counterintuitive to suggest that an editor of the A.M.A., *Guides* is somehow unqualified to interpret and apply the A.M.A., *Guides*. Absent a colorable argument in favor of excluding Dr. Brigham's July 20, 2011 report, the Board finds no basis for precluding Dr. Brigham from serving as DMA.

The Board also disagrees with counsel's argument that there is an unresolved conflict in medical opinion between the DMA and Dr. Diamond. The DMA may create a conflict in medical opinion, however, for a conflict to arise the opposing physician's viewpoints must be of "virtually equal weight and rationale."[18] In this instance the two reports are not virtually equal. As the DMA correctly noted, Dr. Diamond did not apply the appropriate methodology for rating spinal nerve extremity impairment under FECA.

Relying on Dr. Diamond's March 15, 2011 examination findings and appellant's prior EMG/NCV study and cervical MRI scans, the DMA found that the reported muscle weakness affecting the right deltoid, biceps and triceps represented a mild motor deficit involving the C5, C6 and C7 nerve roots. Applying the appropriate table for rating spinal nerve extremity impairment, the DMA explained that a mild motor deficit involving the C6 nerve root represented a default rating of five percent upper extremity impairment. However, when properly adjusted for functional history (grade 2 modifier) and clinical studies (grade 2 modifier), the net adjustment of +2 resulted in a class 1, grade E impairment of nine percent. With respect to the C7 nerve root, the DMA found a default rating of five percent and a net adjustment of +1 based on a grade 2 modifier for clinical studies. The final C7 rating was seven percent RUE impairment. Lastly, the DMA explained that a mild motor deficit affecting the C5 nerve root represented a default rating of four percent. But when adjusted for clinical studies (grade 2 modifier), appellant had a net adjustment of +1, which represented a class 1, grade D upper extremity impairment of six percent. In accordance with the Combined Values Chart, A.M.A., *Guides* 604-06 (6th ed. 2008), the combined C5, C6 and C7 impairments represented an overall RUE impairment of 20 percent.

The DMA's July 20, 2011 impairment rating conforms to the A.M.A., *Guides* (6th ed. 2008) and thus, represents the weight of the medical evidence regarding the extent of appellant's RUE impairment. Although Dr. Kaplan noted his agreement with Dr. Diamond's 23 percent RUE impairment rating, Dr. Kaplan offered no explanation for his August 8, 2011 concurrence. Moreover, Dr. Diamond rated appellant according to Table 15-21, A.M.A., *Guides* 436-44 (6th ed. 2008), which is not the appropriate methodology for rating spinal nerve extremity impairment under FECA. Accordingly, OWCP properly found that appellant had 20 percent impairment of the RUE.

[18] 20 C.F.R. § 10.321; *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

CONCLUSION

Appellant has not established that he has greater than 20 percent impairment of the RUE.[19]

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

[19] Appellant may request a schedule award or increased schedule award based on evidence of new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.