

FACTUAL HISTORY -- xxxxxx676

OWCP accepted that on September 14, 1998 appellant, then a 37-year-old laundry worker, sustained lumbar strain and a permanent aggravation of a preexisting herniated disc at L5-S1 under File No. xxxxxx676. He underwent an anterior and posterior decompression and fusion at L4-S1 on January 5, 1999.

On June 26, 2000 OWCP's medical adviser, utilizing the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (A.M.A., *Guides*), determined that appellant had a three percent impairment of each lower extremity due to radicular pain from S1. By decision dated October 10, 2000, OWCP granted him a schedule award for a three percent permanent impairment of each lower extremity. On January 10, 2001 it denied appellant's request for reconsideration of its October 10, 2000 decision under 5 U.S.C. § 8128(a).

FACTUAL HISTORY -- xxxxxx089

This case has previously been before the Board under this file number. By decision dated April 10, 2009, the Board reversed September 19, 2007 and June 3, 2008 decisions terminating appellant's compensation effective May 14, 2005 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c).² It found that the opinion of the impartial medical examiner was insufficient to resolve the issue of whether he had the capacity to perform the offered position. The facts and circumstances as set forth in the Board's prior decision are hereby incorporated by reference.

In an impairment evaluation dated October 22, 2009, Dr. Scott T. Hardin, a Board-certified physiatrist, discussed appellant's complaints of pain in his left lower extremity. He measured range of motion for the right and left upper and lower extremities. On examination, Dr. Hardin found abnormal two-point discrimination of both lower extremities. He identified a class 1 impairment of the left sural nerve according to Table 16-12 on page 534 of the sixth edition of the A.M.A., *Guides*. Dr. Hardin applied grade modifiers and concluded that appellant had a seven percent left lower extremity impairment.

In a report dated January 21, 2010, Dr. Rudolf Teschan, Board-certified in family medicine, discussed appellant's history of an August 27, 2002 work injury. He diagnosed low back pain and sciatica.

On March 3, 2010 OWCP's medical adviser determined that appellant had a one percent impairment due to radiculopathy of the S1 sural nerve, in addition to the previously awarded three percent impairment under File No. xxxxxx676, for a total impairment of four percent of the left lower extremity. He further found a three percent impairment of the right shoulder due to loss of range of motion, in addition to what he found was a prior award of three percent for the right upper extremity. On March 17, 2010 the medical adviser opined that appellant had a six percent permanent impairment of the left lower extremity due to sciatica pursuant to Table 16-12

² Docket No. 08-1996 (issued April 10, 2009). OWCP accepted that on August 27, 2002 appellant, then a 41-year-old laundry worker, sustained left-sided sciatica in the performance of duty.

on page 535 of the sixth edition of the A.M.A., *Guides*. He further found a three percent right upper extremity impairment due to loss of range of motion.

In a decision dated May 10, 2010, OWCP granted appellant a schedule award for an additional three percent permanent impairment of the left lower extremity. It noted that he had previously received a schedule award for a three percent impairment of each leg under File No. xxxxxx676. By decision dated September 17, 2010, OWCP denied modification of its May 10, 2010 decision.

Appellant appealed to the Board. On October 25, 2011 the Board set aside the September 17, 2010 decision.³ It found that OWCP had referred to evidence from File No. xxxxxx676 in its schedule award decision but that record was not available for its review. The Board remanded the case for it to combine the current File No. xxxxxx676.

FACTUAL HISTORY -- xxxxxx 568

On September 20, 2006 appellant, then a 45-year-old laundry worker, filed an occupational disease claim alleging that he sustained a neck and bilateral shoulder condition in the performance of duty. OWCP accepted the claim for a sprain of the left shoulder, upper arm and rotator cuff.⁴

In a report dated July 24, 2007, Dr. Theodore H. Gertel, a Board-certified orthopedic surgeon, discussed appellant's history of a subacromial decompression and debridement of the left shoulder in October 2006. On examination, he measured active forward flexion of 130 degrees and passive external rotation of 60 degrees and found a mildly positive impingement sign. Dr. Gertel diagnosed subacromial bursitis, anterior labral tears, articular cartilage damage, a partial thickness tear of the anterior supraspinatus tendon and probably ulnar nerve irritation. On November 9, 2009 OWCP's medical adviser reviewed Dr. Gertel's report. He utilized Figure 15-34 on page 475 of the sixth edition of the A.M.A., *Guides* to find that appellant had a three percent impairment of the left arm due to decreased flexion and external rotation. The medical adviser further found a one percent impairment due to impingement syndrome under Table 15-5 on page 402, for a total left upper extremity impairment of four percent.

By decision dated December 15, 2009, OWCP granted appellant a schedule award for a four percent permanent impairment of the left upper extremity. The period of the award ran from July 24 to October 19, 2007.

³ *Order Remanding Case*, Docket No. 11-570 (issued October 25, 2011).

⁴ In a decision dated March 3, 2008, OWCP denied appellant's claim for compensation from September 27, 2006 through January 3, 2007 based on its termination of his compensation for refusing suitable work in File No. xxxxxx089. On June 25, 2008 it denied merit review of its March 3, 2008 decision. By order dated April 14, 2009, the Board set aside the March 3 and June 25, 2008 decisions. *Order Remanding Case*, Docket No. 08-1997 (issued April 14, 2009). It noted that a termination for refusing suitable work barred the receipt of further compensation for the same injury and not for a separate injury. The Board remanded the case for OWCP to adjudicate appellant's claim for disability compensation.

On January 15, 2010 appellant requested reconsideration. He noted that he had not seen Dr. Gertel for over three years.

In a decision dated March 29, 2010, OWCP modified the December 15, 2009 decision. It indicated that OWCP's medical adviser had reviewed the evidence from appellant's multiple claims, including a January 21, 2010 report from Dr. Teschan submitted in File No. xxxxxx089. OWCP noted that in another file number, the medical adviser, in reports dated March 3 and 17, 2010, advised that he had a permanent impairment of the right upper extremity. It indicated that it would issue a new schedule award determination. OWCP further found that appellant had no more than the previously awarded four percent permanent impairment of the left upper extremity.

In a decision dated March 29, 2010, OWCP granted appellant a schedule award for a three percent permanent impairment of the right upper extremity. The period of the award ran from October 22 to December 26, 2009.

On May 5, 2010 appellant requested reconsideration. In a report dated May 13, 2010, Dr. Spencer J. Block, a Board-certified neurosurgeon, discussed appellant's complaints of neck and upper extremity pain subsequent to a fusion at C3-4 and low back pain with left radiculopathy.

On August 2, 2010 OWCP's medical adviser related that based on a review of the evidence he found no basis to alter the finding of a four percent left upper extremity impairment.

By decision dated August 18, 2010, OWCP denied modification of its March 29, 2010 decision. On August 24, 2010 appellant again requested reconsideration. He enclosed the October 13, 2006 operative report from his subacromial decompression and debridement of the glenohumeral joint. In a decision dated November 12, 2010, OWCP denied modification of its August 18, 2010 decision.

Appellant appealed to the Board. In an order dated December 19, 2011, the Board set aside August 18 and November 10, 2010 schedule award decisions.⁵ The Board found that OWCP had referenced medical evidence in two other file numbers that were not available for review. The Board remanded the case for OWCP to combine the file numbers and issue an appropriate decision.

By decision dated May 24, 2012, OWCP denied modification of its March 29, 2010 decision in File No. xxxxxx568 and its September 17, 2010 decision in File No. xxxxxx089.

On appeal, appellant describes his pain and questions the schedule award determination.

⁵ *Order Remanding Case*, Docket No. 11-811 (issued December 19, 2011).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁶ and its implementing federal regulations⁷ 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

The sixth edition requires identifying 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).¹⁰ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July to August 2009) is to be applied.¹¹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained lumbar strain and a permanent aggravation of a preexisting herniated disc at L5-S1 due to a September 14, 1998 employment injury in File No. xxxxxx676. By decision dated October 10, 2000, it granted him a schedule award for a three percent permanent impairment of each lower extremity due to radicular pain from S1.

OWCP further accepted that appellant sustained sciatica on the left side due to an August 27, 2002 work injury in File No. xxxxxx089. On October 22, 2009 Dr. Hardin noted that he complained of pain in his left lower extremity extending into his foot and numbness of the foot. On examination, he found abnormal sensation and an antalgic gait. Dr. Hardin utilized the diagnosis of a left sural nerve impairment under Table 16-12 of the sixth edition of the A.M.A., *Guides* in rating appellant's impairment. After applying grade modifiers, he found a seven percent left lower extremity impairment. On March 3, 2010 OWCP's medical adviser reviewed Dr. Hardin's clinical findings and advised that appellant had a one percent impairment due to

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* 494-531.

¹¹ *See P.G.*, Docket No. 12-30 (issued May 15, 2012); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) *The Guides Newsletter* is included as Exhibit 4.

radiculopathy from the S1 sural nerve. On March 17, 2010 the medical adviser determined that appellant had a six percent impairment of the left lower extremity using Table 16-12. Neither Dr. Hardin nor the medical adviser, however, referenced the A.M.A., *Guides*' July to August 2009 Newsletter in evaluating the extent of appellant's lower extremity impairment due to his spinal injury. As noted above, for nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the examiner should apply the July to August 2009 *The Guides Newsletter*.¹² The Board will thus remand the case for proper application of the A.M.A., *Guides* regarding the extent of appellant's permanent impairment of the left lower extremity.

LEGAL PRECEDENT -- ISSUE 2

With respect to evaluation of shoulder impairments, reference is first made to Table 15-5 (Shoulder Regional Grid). A class of diagnosis may be determined from the Shoulder Regional Grid.¹³ Table 15-5 also provides that, if loss of motion is present, the 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-based impairment.¹⁴

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.¹⁵

ANALYSIS -- ISSUE 2

Regarding the extent of impairment of appellant's left upper extremity, in File No. xxxxxx568 OWCP accepted that he sustained sprains of the left shoulder, upper arm and rotator cuff. In a report dated July 24, 2007, Dr. Gertel noted that appellant underwent a subacromial decompression of the left shoulder in October 2006. He measured range of motion of the left shoulder as 130 degrees forward flexion and 60 degrees passive external rotation. OWCP's medical adviser reviewed Dr. Gertel's report in November 2009. He applied the sixth edition of the A.M.A., *Guides* and found that, under Table 15-34, appellant had a three percent impairment of the left arm due to loss of range of motion in flexion and external rotation. The medical adviser also applied the diagnosis-based grid for the shoulder at Table 15-5 to find an additional one percent left upper extremity impairment due to impingement syndrome, for a total left upper extremity impairment of four percent. He based his range of motion rating, however, only on Dr. Gertel's measurements for forward flexion and external rotation. The A.M.A., *Guides* requires evaluation of six ranges of motion for the shoulder: flexion, extension, abduction, adduction, external rotation and internal rotation.¹⁶ Dr. Gertel's report thus provides insufficient

¹² *Id.*

¹³ See *P.W.*, Docket No. 11-1962 (issued April 17, 2012); see also A.M.A., *Guides* 401-11 (6th ed. 2009).

¹⁴ A.M.A., *Guides* 405, Table 15-5.

¹⁵ See *Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

¹⁶ A.M.A., *Guides* 475.

clinical findings to evaluate appellant's shoulder impairment using range of motion.¹⁷ Additionally, the medical adviser combined the range of motion impairment with a diagnosis-based impairment; however, an impairment due to range of motion stands alone and is not combined with a diagnosis-based impairment.¹⁸ Accordingly, the Board finds that the case must be remanded to OWCP to obtain a report consistent with the A.M.A., *Guides* on the issue of appellant's left upper extremity impairment.

Regarding appellant's right upper extremity impairment, the Board notes that OWCP accepted that appellant sustained lumbar strain and a permanent aggravation of a herniated disc at L5-S1 under File No. xxxxxx676. It accepted that he sustained left-sided sciatic under file number xxxxxx089. OWCP further found that appellant sustained a left shoulder, upper arm and rotator cuff sprain under File No. xxxxxx568. In reports dated February 3 and March 3 and 17, 2010, submitted in association with File No. xxxxxx089, an OWCP medical adviser reviewed Dr. Hardin's report and opined that appellant had a three percent right upper extremity impairment due to loss of range of motion.

In decisions dated March 29, 2010, issued in File No. xxxxxx568, OWCP discussed OWCP's medical adviser's finding in File No. xxxxxx089. It granted appellant a schedule award for a three percent permanent impairment of the right upper extremity. OWCP, however, did not explain why he was entitled to a schedule award for a permanent impairment of the right upper extremity. It does not appear from the records that it accepted a condition that would result in a right upper extremity impairment. Consequently, on remand, the medical adviser should review the case records and provide an opinion regarding whether appellant has a permanent impairment of the right upper extremity due to an accepted work injury. After such further development as deemed necessary, it should issue an appropriate *de novo* decision on appellant's schedule award claims.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁷ See *W.F.*, Docket No. 11-440 (issued October 27, 2011).

¹⁸ A.M.A., *Guides* 405, Table 15-5.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 3, 2012
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