United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 12-361**
	)	**Issued: September 10, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer	)	

Appearances:
Sylvia R. Johnson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 6, 2011 appellant, through her attorney, filed a timely appeal from a July 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for an increased 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 the claim.

ISSUE

The issue is whether appellant has more than 28 percent permanent impairment of the left arm for which she previously received a schedule award.

FACTUAL HISTORY

On April 4, 2005 appellant, then a 57-year-old modified limited-duty window clerk, injured her left wrist and hand when she slipped and fell in a bathroom at work. OWCP accepted

[1] 5 U.S.C. §§ 8101-8193.

the claim for fracture of lower end of radius (left wrist), scapholunate ligament injury, ulnar styloid fracture and left carpal tunnel syndrome. On July 26, 2005 appellant had an osteotomy of distal radial fracture, internal fixation osteotomy with a volar fixed angle plate, proximal ulna bone grafting to osteotomy site, open distal radial ulnar joint relocation and intraoperative fluoroscopy. She stopped work on the date of injury and did not return. Appellant elected retirement benefits as of June 11, 2006. The record reflects that, under case File No. xxxxxx877, OWCP accepted the conditions of: left lateral epicondylitis, left tenosynovitis, left ulnar nerve lesion and complications of surgery left arm/elbow. On April 12, 2004 appellant received five percent permanent impairment of the left upper extremity.[2]

By decision dated March 22, 2007, OWCP granted appellant a schedule award for a total of 28 percent permanent impairment of the left arm. The award was due to loss of wrist range of motion and loss of strength and sensory deficit due to impairment of the median nerve. This award represented an additional 23 percent impairment from the previous determination of 5 percent made under case File No. xxxxxx877.

On February 10, 2010 appellant requested an increased schedule award. In a March 16, 2010 report, Dr. Edward Diao, an orthopedic surgeon, declared her permanent and stationary. In a March 16, 2010 permanent impairment worksheet of the upper extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), he opined that the deformity of appellant's wrist amounted to 10 percent impairment.

On May 19, 2010 OWCP's medical adviser, Dr. Ellen Pichey, Board-certified in family and occupational medicine, reviewed both claim files affecting the left arm. She noted the date of maximum improvement was March 16, 2010, but that Dr. Diao did not use the sixth edition of the A.M.A., *Guides* in calculating impairment. Using his March 16, 2010 report, Dr. Diao opined that appellant had four percent left arm impairment. Under Table 15-2, page 394, class 2 impairment for left index finger metacarpal joint arthrodesis was 20 percent digit impairment. Under Table 15-9, page 410, a grade modifier 1 was provided for Clinical Studies (GMCS); under Table 15-8, page 408, a grade modifier 1 was provided for Physical Examination (GMPE); under Table 15-7, page 406, a grade modifier 1 was provided for Functional History (GMFH). Using the net adjustment formula under page 411, the medical adviser found zero net adjustment. Under Table 15-12, page 421, she found the 20 percent left index finger impairment converted to 4 percent hand impairment and 4 percent arm impairment. The medical adviser concluded that appellant had no additional impairment in view of her previous schedule awards.

By decision dated May 27, 2010, OWCP denied the claim for additional permanent impairment of the left upper extremity as the 4 percent impairment rated under the sixth edition of the A.M.A., *Guides* was less than the previously awarded 28 percent impairment.

Appellant requested a review of the written record. In a July 2, 2010 report, Dr. Diao stated that her impairment was based on the descriptions in his March 16, 2010 report. He found residual carpal boss on the left wrist that was post incision of carpal boss and tenolysis. There

[2] The record reflects that appellant has other claims, including claim number xxxxxx281, accepted for right arm conditions. Claim File Nos. xxxxxx281 and xxxxxx877 are combined with the present claim.

was also mild radial sensory nerve irritation. Dr. Diao noted appellant's surgery was performed March 30, 2009 with left first dorsal compartment tendinitis and pain and left carpometacarpal joint second digit carpal boss with osteophytes. He indicated that her incisions were well healed, tendinitis was significantly improved and the first dorsal compartment problem was completely resolved. Dr. Diao stated that appellant had current difficulty to some activities of daily living secondary to the radial sensory nerve irritation over the carpal boss area and some tenderness. He opined that based on Table 15-11 her moderate discomfort with palpable joint swelling and radial sensory nerve irritation equated to 20 percent hand impairment, which converted to 18 percent arm impairment and 11 percent whole person impairment.

By decision dated September 22, 2010, OWCP's hearing representative affirmed the May 27, 2010 decision.

On October 18, 2010 appellant contacted OWCP to obtain a schedule award evaluation. She noted that her physician, Dr. Richard Nolan, a Board-certified orthopedic surgeon, referred her to Dr. Joel Weddington, an orthopedic surgeon, for an impairment evaluation. OWCP approved the referral and sent a letter on the same date indicating such. In a November 15, 2010 report, Dr. Weddington noted examination findings for both the right and left arms and diagnosed lateral epicondylitis, right elbow; medial epicondylitis and cubital tunnel syndrome, status post release and ulnar nerve transposition; and peripheral ulnar neuropathy in the right upper extremity. Examination of the left elbow demonstrated range of motion of 0 to 120 degrees, appellant had satisfactory range of motion of the left wrist and impaired sensation in the ulnar nerve distribution. Dr. Weddington opined that she was at maximum medical improvement. He rated appellant's impairment for the right arm.

In a September 29, 2010 report, Dr. Diao indicated that appellant had left elbow surgery by Dr. Nolan for medial epicondylitis in April 2010. He noted that her grip strength was 18 kilograms bilaterally. Dr. Diao indicated that the radial deviation of 15 degrees and ulnar deviation of 20 degrees equated to one and two percent upper extremity impairment respectively for a total three percent impairment.

In a December 19, 2010 report, the medical adviser, Dr. Pichey, noted the accepted conditions under the current file as well as File No. xxxxxx877. She reviewed the additional reports from Dr. Weddington and Dr. Diao and found six percent impairment due to loss of range of motion based on Dr. Weddington's findings. For the elbow, under Table 15-33, page 474, the medical adviser stated that loss of flexion was three percent impairment. For the wrist, under Table 15-32, page 473, she stated that loss of radial deviation was one percent impairment and loss of ulnar deviation was two percent impairment. The medical adviser indicated that functional history grade modification was zero under Table 15-36, page 477. Thus, appellant had total six percent impairment of the left arm, which resulted in no additional impairment for that arm. The medical adviser noted that, while Dr. Diao's July 2, 2010 report listed 11 percent whole person impairment, this would still be less than the 28 percent left arm impairment previously found. She further noted that Dr. Weddington rated only the right arm, but gave range of motion measurements for the left arm.

By decision dated February 3, 2011, OWCP denied appellant's claim for an additional schedule award.

On May 11, 2011 appellant requested reconsideration. She argued that the medical adviser did not include her impairments to her index finger (20 percent) and hand (4 percent) as part of her previous schedule award for her left arm of 28 percent. In an undated letter to OWCP, appellant stated that Dr. Nolan had not declared her stationary from her left elbow surgery. She also asserted that the matter was confusing as she sought a schedule award for her left arm, not her right arm.

In a June 6, 2011 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed appellant's claim files to determine appellant's left arm impairment. He diagnosed: (1) malunion left distal radius; (2) status post left distal radius osteotomy, internal fixation, bone grafting, open distal radioulnar joint relocation, July 26, 2005; (3) status post left extensor retinacular release, tenolysis abductor pollicis longus, extensor pollicis brevis and extensor pollicis longus, second digit carpometacarpal joint arthroplasty, extensor carpi radialis longus and brevis tenosynovectomy, March 30, 2009; and (4) status post left cubital tunnel exploration, mobilization of the ulnar nerve, transposition of the ulnar nerve and subtotal medial epicondylectomy, April 23, 2010. Appellant reached maximum medical improvement on November 15, 2010 and, under the sixth edition of the A.M.A., *Guides*, had 12 percent impairment of the left arm. Under Table 15-3, page 449, she had five percent impairment for residual problems with the left wrist after surgery for malunion. Under Table 15-3, page 395, appellant had one percent impairment for residual problems after left de Quervain's release. Under Table 15-23, page 449, she had two percent impairment for residual problems with mild cubital tunnel symptoms after cubital tunnel surgery. Under Table 15-2, page 399, appellant had 20 percent left index digit impairment for metacarpal phalangeal joint arthroplasty, which converted to 4 percent arm impairment. Dr. Harris combined the impairment values to find a total 12 percent left upper extremity impairment. He further concluded that appellant was not entitled to an additional impairment beyond the 28 percent left arm impairment previously awarded.

By decision dated July 7, 2011, OWCP denied modification of its previous decision. It found that, although appellant established 12 percent impairment to the left upper extremity, this was less than the 28 percent impairment previously awarded.

LEGAL PRECEDENT

A claim for an increased schedule award may be based on new exposure.[3] Absent any new exposure to employment factors, a claim for an increased schedule award may also be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.[4]

The schedule award provision of FECA and its implementing regulations[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

[3] *A.A.*, 59 ECAB 726 (2008); *Tommy R. Martin*, 56 ECAB 273 (2005); *Rose V. Ford*, 55 ECAB 449 (2004).

[4] *James R. Hentz*, 56 ECAB 573 (2005); *Linda T. Brown*, 51 ECAB 115 (1999).

[5] 20 C.F.R. § 10.404; *see* 5 U.S.C. § 8107.

loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.[6] 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] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

In determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.[9] Any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.[10]

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] The A.M.A., *Guides* also provide that, if motion loss if present, some impairments may alternatively be assessed[12] using section 15.7, range of motion impairment.[13]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[14]

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[6] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[7] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

[9] *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446 (2002).

[10] Federal (FECA) Procedure Manual, *supra* note 8 at, Chapter 2.808.7(a)(2) (January 2010).

[11] A.M.A., *Guides* 411.

[12] *Id.* at 405.

[13] *Id.* at 461.

[14] *See* Federal (FECA) Procedure Manual, *supra* note 8 at, Chapter 2.808.6(d) (August 2002).

ANALYSIS

The Board finds that appellant has not established that she sustained more than 28 percent impairment to the left arm for which she previously received schedule awards. On February 10, 2010 she filed a claim for an additional schedule award.

It is appellant's burden to submit sufficient evidence to establish the extent of permanent impairment.[15] The accepted conditions are fracture of lower end of radius (left wrist), scapholunate ligament injury, ulnar styloid fracture, left carpal tunnel syndrome, left lateral epicondylitis, left tenosynovitis, left ulnar nerve lesion and complications of surgery left arm/elbow.

Appellant submitted reports from Dr. Diao addressing her left arm impairment. However, these reports are not sufficient to establish that she has more than 28 percent left arm impairment, for which she previously received schedule awards. The Board notes that none of Dr. Diao's reports clearly explain how he calculated appellant's impairment under the sixth edition of the A.M.A., *Guides.* For example, he did not note how he applied grade modifiers to particular diagnoses under specific tables in the A.M.A., *Guides*.[16] Thus, Dr. Diao's reports are of diminished probative value regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.[17] The Board notes that, in any event, he did not indicate in any report that appellant had greater than 28 percent impairment of the left arm for which she previously received schedule awards. Other reports submitted by appellant do not specifically address permanent impairment of the left arm pursuant to the sixth edition of the A.M.A., *Guides.*

On May 19, 2010 Dr. Pichey, an OWCP medical adviser, reviewed Dr. Diao's March 16, 2010 report and found that appellant had four percent upper extremity impairment under the sixth edition of the A.M.A., *Guides*. In her December 19, 2010 report, she reviewed additional reports from Dr. Diao and Dr. Weddington and recalculated the left upper extremity impairment under the sixth edition of the A.M.A., *Guides* to be six percent. The medical adviser noted that Dr. Diao had provided a whole-person impairment of 11 percent, which is not acceptable under FECA.[18] She noted that, even with errors in Dr. Diao's report, the impairment rating under the sixth edition of the A.M.A., *Guides* would be less than the 28 percent impairment previously found for the left upper extremity. Using the range of motion findings of the left arm contained in Dr. Weddington's report, the medical adviser calculated six percent impairment. She supplied complete measurements, citations and calculations to support her impairment rating under the sixth edition of the A.M.A., *Guides*. Since appellant previously received a schedule award for 28 percent permanent impairment of the left upper extremity, the medical evidence of record did not support an increase in the impairment already compensated.

[15] *See Annette M. Dent*, 44 ECAB 403 (1993).

[16] *See supra* note 11.

[17] *See Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

[18] *See Tommy R. Martin*, 56 ECAB 273 (2005).

Following appellant's request for reconsideration, OWCP referred her case file to another medical adviser, Dr. Harris, for an opinion on left arm permanent impairment. Dr. Harris reviewed the medical evidence in both of her claims and opined that, under the sixth edition of the A.M.A., *Guides*, she had 12 percent left upper extremity impairment. He cited appropriate tables and properly discussed his calculations within the A.M.A., *Guides* in finding that appellant had five percent impairment based on malunion of the left wrist status post surgery, one percent impairment for residuals problems status post left de Quervain's release, two percent impairment for residual problems with mild cubital tunnel symptoms status post cubital tunnel surgery and four percent impairment for left index digit metacarpal phalangeal joint arthroplasty. Dr. Harris opined that there was currently no increased impairment.

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 28 percent impairment of the left arm. As explained, both OWCP medical advisers found that she currently had less impairment than that for which she previously received a schedule award. Accordingly, appellant has not established that she is entitled to a schedule award greater than those previously received.[19]

On appeal and before OWCP, appellant argued the impairment for her index finger and hand was not included in the schedule award. The Board notes that Dr. Harris considered her index finger impairment and properly converted this to arm impairment under Table 15-11, page 430 of the A.M.A., *Guides*.[20] Contrary to appellant's assertion on appeal, OWCP's request that Dr. Harris review the matter does not amount to physician shopping. As noted, its procedures contemplate that OWCP medical advisers play a role in determining impairment ratings.[21] It was not improper for OWCP to request an opinion from its medical adviser.

Appellant 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 has not established entitlement to an additional schedule award for his left upper extremity greater than the 28 percent previously received.

[19] FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

[20] *See Dennis R. Stark*, 57 ECAB 306 (2006) (where the residuals of an injury to a scheduled member of the body extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into a hand, or a hand into the arm, or of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member).

[21] *See supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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